

1167

No. 3153

1167

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

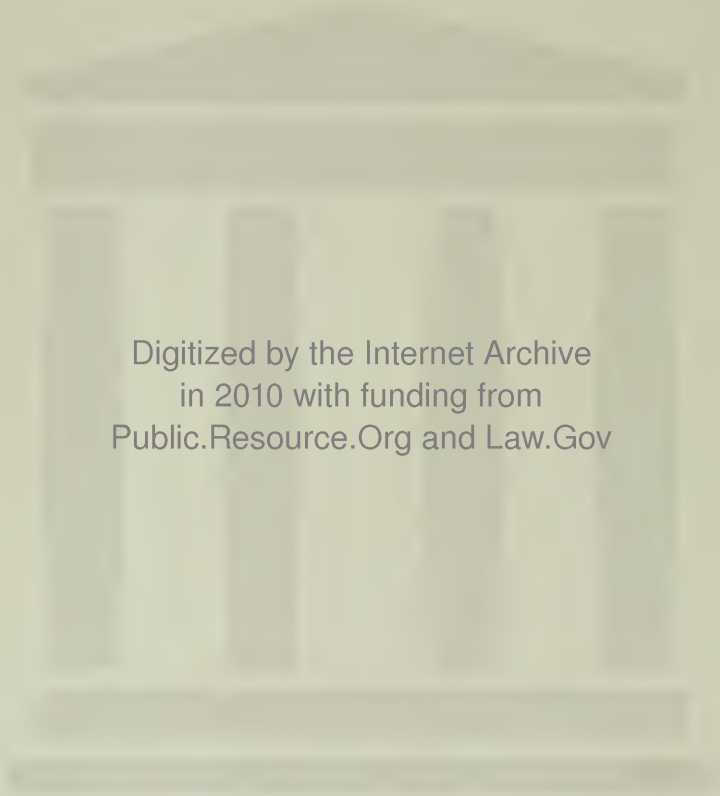
J. W. ROMAINE and MARTHA B. ROMAINE, His Wife, FRED J. WOOD and ANNA WOOD, His Wife, ROBERT SHIELDS and AUGUSTA J. SHIELDS, His Wife, Estate of M. J. CLARK, ELLEN CLARK, His Widow, PHILIP CLARK and MRS. SAMUEL MAYHEW, Together With the Executor of the Estate of Said M. J. CLARK and the Heirs at Law Thereto When the Same Shall be Determined, C. M. ADAMS and BELLE M. ADAMS, His Wife, JOHN WILLIAMS, MATILDA FRANCES, EDWARD WARBASS, PHILIP BOB, HARRY PRICE, HENRY SENIOR and DANIEL CUSH, and All Persons Claiming an Interest in the Property Herein Described,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
JUN 13 1913



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE, His Wife, FRED J. WOOD and ANNA WOOD, His Wife, ROBERT SHIELDS and AUGUSTA J. SHIELDS, His Wife, Estate of M. J. CLARK, ELLEN CLARK, His Widow, PHILIP CLARK and MRS. SAMUEL MAYHEW, Together With the Executor of the Estate of Said M. J. CLARK and the Heirs at Law Thereto When the Same Shall be Determined, C. M. ADAMS and BELLE M. ADAMS, His Wife, JOHN WILLIAMS, MATILDA FRANCES, EDWARD WARBASS, PHILIP BOB, HARRY PRICE, HENRY SENIOR and DANIEL CUSH, and All Persons Claiming an Interest in the Property Herein Described,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Index.	Page
TESTIMONY ON BEHALF OF THE GOVERNMENT—Continued:	
BETTS, F. G.	66
BREMNER, GEORGE	89
CAMPBELL, A. R.	81
CAMPBELL, CAPT. GEORGE R.	51
Cross-examination	58
Redirect Examination	61
Recross-examination	62
In Rebuttal	151
DESCANUM, ALBERT	86
In Rebuttal	152
EVANS, D. H.	64
JAMES, PETER	67
JEFFERSON, THOMAS	75
KAVINA, HENRY	85
McCLOSKEY, WILLIAM	73
SNOW, JOSEPH M.	93
Cross-examination	104
Recalled	149
Cross-examination	150
TSILANO, GEORGE	83
WARBES, GEORGE	88
TESTIMONY ON BEHALF OF DEFENDANTS:	
COUPE, MRS. NELL S.	138
JONES, JOHN S.	144
Cross-examination	147
JUDSON, CHARLES L.	140
Cross-examination	141

Index.

Page

TESTIMONY ON BEHALF OF DEFEND-

ANTS—Continued:

LIKINS, J. L.	143
RODER, VICTOR A.	116
Cross-examination	127
SHIELDS, ROBERT	134
Cross-examination	136
TAWES, C. T.	111
Cross-examination	113

Names and Addresses of Counsel.

BEN L. MOORE, Esq., Attorney for Plaintiff,
Federal Building, Seattle, Washington.

DONALD A. McDONALD, Esq., Attorney for
Plaintiff,
Federal Building, Seattle, Washington.

Messrs. ROMAINE & ABRAMS, Attorneys for
Defendants,
Bellingham, Washington.

Messrs. HADLEY & ABBOTT, Attorneys for
Defendants,
Bellingham, Washington. [1*]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and ANNA
WOOD, His Wife, ROBERT SHIELDS
and AUGUSTA J. SHIELDS, His Wife,
Estate of A. J. ZANE, Together With the
Executor Thereof and the Heirs at Law
Thereto When the Same Shall be Deter-
mined, Estate of M. J. CLARK, ELLEN

II.

The plaintiff in the year 1855, and for a long time prior thereto was seised and possessed of certain real property situated at, in and around the mouth of what was then known as the Lummi River, which has since been renamed the Nooksack, in what is now the Northern Division of the Western District of the State of Washington in Whatcom County, which said lands were then and for a long time prior thereto had been a part of the public domain of the United States.

On January 22, 1855, the plaintiff, acting by and through Isaac I. Stevens, Governor and Superintendent of Indian Affairs, for the Washington Territory, entered into a treaty at Point Elliott, Puget Sound, with the chiefs, head-men and delegates of Dwamish, Suquamish and other allied tribes in said Washington Territory, which said treaty was reduced to writing; whereby in Article 2 thereof, the plaintiff reserved for the use and occupation of the said tribes and bands of Indians, certain tracts of land, and among others the following, to wit:

“ * * * , and the island called Chah-choosen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia.
* * * ”

Said Article 2 of said treaty further provided that said tracts should be set apart and as far as necessary [4] surveyed and marked out for the exclusive use of said Indians. Thereafter for the purpose of defining and establishing the boundaries of

the Indian reservation created by said treaty, the plaintiff, by President U. S. Grant, made its proclamation establishing said Lummi Indian Reservation pursuant to the terms and directions of said treaty as follows, to wit:

“EXECUTIVE MANSION,

November 22, 1873.

“It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz.: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 2 east of the Willamette meridian; thence due north on said section line to the township line between townships 38 and 39; thence west along said township line to the low-water mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857. (Stats. at Large, vol. 12, p. 928.)

U. S. GRANT.”

chains; west 57.29 chains; to the place of beginning, containing 376.63 acres,"

lying and being in said Whatcom County within the division and district aforesaid.

And thereafter on October 2, 1911, the said defendants, C. M. Adams and Belle M. Adams, his wife, assigned and transferred their undivided one-third interest in and to said real estate contract and the lands described therein, hereinabove set out, to defendant Robert Shields.

VI.

On the 11th day of October, 1911, the State of Washington made, executed and delivered its deed conveying in fee simple the following described real property situate in Whatcom County aforesaid within said division and district, to wit:

Beginning at a point 3.00 chains south and 1.25 chains west of the corner common to sections 7, 8, 17, and 18, T. 38 N., R. 2 E., W. M., running thence north $89^{\circ} 11'$ east, 19.58 chains; S. $42^{\circ} 22'$ east, 2.05 chains; south $59^{\circ} 52'$ east, 2.79 chains; south $67^{\circ} 05'$ east, 9.10 chains; south $79^{\circ} 05'$ east, 2.00 chains; south $24^{\circ} 05'$ east, 3.26 chains; south $15^{\circ} 05'$ east, 5.60 chains; [7] south 50.00 chains; west 57.29 chains; north $12^{\circ} 42'$ west, 33.21 chains; north $7^{\circ} 02'$ west, 3.80 chains; north $0^{\circ} 02'$ west, 8.61 chains; north $14^{\circ} 07'$ west, 11.33 chains; north $16^{\circ} 58'$ east, 1.51 chains; north 59° east, 1.14 chains; south $37^{\circ} 47'$ east, 1.16 chains; south $71^{\circ} 51'$ east, 0.82 chains; north $39^{\circ} 39'$ east, 1.04 chains; south $77^{\circ} 16'$ east,

3.29 chains; south $72^{\circ} 07'$ east, 3.00 chains; south $62^{\circ} 21'$ east, 1.33 chains; south $47^{\circ} 16'$ east, 4.42 chains; south $82^{\circ} 12'$ east, 1.30 chains; south $67^{\circ} 41'$ east, 3.46 chains; south $83^{\circ} 06'$ east, 2.57 chains; north $85^{\circ} 03'$ east, 1.44 chains; north $6^{\circ} 17'$ east, 3.40 chains; north $50^{\circ} 47'$ east, 4.10 chains; north $1^{\circ} 41'$ east, 1.14 chains; north $23^{\circ} 59'$ east, 1.94 chains; north $29^{\circ} 59'$ east, 2.48 chains; north $36^{\circ} 52'$ east, 1.58 chains; north $41^{\circ} 52'$ east, 1.71 chains; north $49^{\circ} 57'$ east, 1.41 chains; to the place of beginning, containing 375.50 acres,

to defendants, J. W. Romaine, F. J. Wood and Robert Shields.

VII.

That all and singular the above described parcels of land lie within the exterior boundaries, of the Lummi Indian Reservation as the same was established, defined and bounded by the said treaty and presidential proclamation, in what is now sections seventeen and eighteen of township thirty-eight, north, of range two east, of the Willamette Meridian, in Whatcom County, Washington, within said division and district aforesaid, and are a part of the public domain of the United States.

VIII.

The said several deeds and contract, purporting and attempting to convey title to the defendants hereinafter mentioned to the lands mentioned and described therein cloud, encumber and injure the plaintiff's title and serve to continually and constantly annoy, harass and disturb the plaintiff in the quiet

and peaceful enjoyment [8] of said lands which it had set aside for the use and benefit of said Indians. That from time to time trespasses have been committed on said lands by the white defendants named herein, and others to the plaintiff unknown, and the outstanding purported, pretended and allege title from the State of Washington operates as and furnishes an alleged and pretended justification to said defendants and others to continue to trespass on said lands and on said Indian Reservation.

IX.

That all and singular, the purported, attempted and pretended conveyances of the State of Washington to said mentioned defendants, attempting and purporting to convey the said tide-lands herein described are and were null and void and the State of Washington was without legal authority to enter into or make or execute the said conveyances or to sell or dispose of the said lands, and the said mentioned defendants, J. W. Romaine, Martha B. Romaine, Fred J. Woods, Anna Woods, Robert Shields, August J. Shields and M. J. Clark, acquired no legal or lawful right, title, interest or estate in or to said lands, and their said pretended and alleged claims of ownership and title constitute a cloud on plaintiff's title.

X.

That all and singular the lands described herein are vacant and unoccupied tide-lands at the mouth of the Nooksack River, in the possession of the plaintiff and [9] all within the boundaries of said Lummi Reservation.

XI.

That defendants, J. W. Romaine, Martha B. Romaine, Fred J. Wood, Anna Wood, Robert Shields, Augusta J. Shields, Ellen Clark, Philip Clark, Mrs. Samuel Mayhew, and the heirs at law of M. J. Clark, claim and assert title and interest in said lands by virtue of said void and unlawful deeds and contracts from the State of Washington and pretend to own the same. That as plaintiff's attorneys have been informed and verily believe one A. J. Zane, since deceased, had or pretended to have an alleged interest in said described real property or in similar real property, to wit, tide-lands at the mouth of said Nooksack River in said sections and township aforesaid, and within the boundaries of said reservation. That said A. J. Zane is now represented by the heirs at law and devisees of said estate, their names being to plaintiff unknown, and they are made parties hereto for the purpose of determining the extent of said alleged and pretended interest and of expunging the same and quieting title as against them. That C. M. Adams and Belle Adams were named in the original contract of sale herein referred to and may have or claim an interest of record in the contract of sale herein referred to notwithstanding the subsequent assignment to defendant Shields.

XII.

That said Indian defendants are made parties for the reason that the plaintiff has allotted said lands [10] in Sections 17 and 18 aforesaid in trust to said Indians and have caused its restricted trust patent

to issue, and as such allottees they will or may be affected by the decree in this cause.

XIII.

The plaintiff has no adequate remedy at law whereby its title to said reservation may be quieted and relieved of the pretended claim of the defendants and the several deeds and contract described herein canceled, set aside and decreed to be null and void: That the lands described in this complaint, title to which the plaintiff seeks to quiet and to remove encumbrances therefrom lie and are situate in Whatcom County, within the Northern Division of the Western District of the State of Washington and within the jurisdiction of this court.

PRAYER.

IN CONSIDERATION WHEREOF and for inasmuch as the [11] plaintiff is without full and adequate remedy in the premises, save in a court of equity, and to the end that the defendants, and each of them, may full, true and direct answer make to all and singular the matters and things herein set out, and may fully disclose and state their claims to the said land, and whatever, right title or interest they may have in and to the said lands described in this complaint, or to any part thereof, as fully as if they had been particularly interrogated thereunto, but not under oath (an answer under oath being hereby expressly waived), plaintiff now prays the Court that all and singular the several conveyances, deeds and other instruments purporting on their face to convey an interest in and to the lands described herein, to the several defendants men-

tioned in this cause, be decreed to be null and void and of no legal effect, and that the said deeds, instruments and other conveyances purporting to convey or establish an interest in and to the above-described lands be canceled, set aside and decreed to be null and void, and the several alleged owners of said lands named as defendants in this action be decreed to have no estate, right, title or interest in said lands.

Plaintiff further prays that its title be quieted as against the claims of each and every of the defendants named herein and all and singular as against the claims and demands of any person or persons whomsoever having or claiming to have an interest in and to said lands, and the plaintiff be decreed to be the owner of said lands as against all the world, subject to such right, title or interest as the plaintiff has created or [12] has conveyed to the Indian defendants herein named; and that plaintiff have such other and further relief as in equity may seem meet.

May it please your Honor to grant unto the plaintiff a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court, directed to the defendants, and each of them, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, to appear before this Honorable Court and then and there full, true and direct answers make to all and singular the premises, and stand to perform and abide by said order, direction and decree as may be made against them, or any of them,

in the premises as shall be meet and agreeable in equity.

THOMAS W. GREGORY,
Attorney General of the United States.

CLAY ALLEN,
United States Attorney for the Western District of
Washington.

WINTER S. MARTIN,
Assistant United States Attorney for the Western
District of Washington. [13]

The United States of America,
Western District of Washington,
Northern Division,—ss.

Winter S. Martin, being first duly sworn, upon oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, and makes this verification for and on behalf of Thomas W. Gregory, Attorney General of the United States, and Clay Allen, United States Attorney for the Western District of Washington; that he has read the foregoing bill of complaint, subscribed by him, knows the contents thereof and that the same are true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

WINTER S. MARTIN.

Subscribed and sworn to before me this 26th day of September, A. D. 1916.

[Seal] ED M. LAKIN,
Deputy Clerk U. S. District Court, Western District
of Washington.

[Endorsed]: Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 17, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [14]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8-E.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and ANNA
WOOD, His Wife, ROBERT SHIELDS and
AUGUSTA J. SHIELDS, His Wife, Estate
of A. J. ZANE, Together With the Executor
Thereof and the Heirs at Law Thereto When
the Same Shall be Determined; Estate of
M. J. CLARK, ELLEN CLARK, His Widow,
PHILIP CLARK and Mrs. SAMUEL MAY-
HEW, Together With the Executor of the Es-
tate of Said M. J. CLARK, and the Heirs at law
Thereto When the Same Shall be Determined;
C. M. ADAMS and BELLE M. ADAMS, his
wife; JOHN WILLIAMS, MATILDA
FRANCES, EDWARD WARBASS, PHIL-
IP BOB; HARRY PRICE, HENRY SEN-
IOR, and DANIEL CUSH, and All Persons
Claiming an Interest in the Property Therein
Described,

Defendants.

Answer to Bill of Complaint.

The answer of Jerome W. Romaine (designated in said bill of complaint as J. W. Romaine) and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull; A. H. Zane and Clara B. Zane, successors in interest of A. J. Zane, deceased; Ellen Clark, Philip Clark and Katherine Mayhew, successors in interest of M. J. Clark, deceased, Charles M. Adams (designated in the bill of complaint as C. M. Adams) and Belle M. Adams, his wife, to the bill of complaint exhibited against them by the above-named complainant, respectfully showeth: [15]

These defendants now and at all times hereafter reserving and saving to themselves and each of them, all, and all manner of, benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answering say:

1.

Answering the allegations contained in the 1st paragraph of said bill of complaint, said defendants aver that the true Christian name of J. W. Romaine mentioned therein is Jerome W. Romaine, and admit that he and the said Martha B. Romaine are husband and wife, having married since the alleged

cause of action in said complaint complained of arose; admit that Fred J. Wood and Anna Wood are and were at all times mentioned in the bill of complaint herein, husband and wife; and that Robert Shields and Augusta J. Shields are and were at all times in the bill of complaint herein mentioned, husband and wife; aver that Georgia Zane Bull, A. J. Zane and Clara B. Zane, are the owners by reason of conveyance from A. J. Zane, now deceased, during his lifetime of all interest in the properties in the bill of complaint herein described formerly owned by the said A. J. Zane; and that Ellen Clark, as devisee, and Philip Clark and Katherine Mayhew, as the children and heirs at law of M. J. Clark, now deceased, are the owners of all the interest formerly owned by the said M. J. Clark in and to the properties in the bill of complaint herein mentioned; aver that the defendants Charles M. Adams (designated in the bill of complaint as C. M. Adams) and Belle M. Adams, are husband and wife, and that they have heretofore sold and conveyed all their right, title, claim and interest in and to all the properties in said bill [16] of complaint mentioned to defendants Robert Shields and Augusta J. Shields, his wife, and now claim and assert no interest whatever in and to said properties or any part thereof, and disclaim any right, title, claim or interest therein or thereto.

2.

That pursuant to authorization by Congress and appropriation for the survey of the exterior boundaries of Indian reservations and subdividing portions of the same, a contract was entered into on the

13th day of August, 1873, between William McMicken, Surveyor-general of the United States for the Territory of Washington, acting for and on behalf of the United States, and Thomas M. Reed, Henry McCartney, Addison A. Lindsley and J. M. Snow for the survey of the exterior boundaries of the Lummi Indian Reservation and for the subdivision thereof in the manner and form particularly described in special instruction from the Surveyor-general of Washington Territory, which said instructions were made a part of said contract. That in pursuance of said contract the said Reed, McCartney, Lindsley and Snow surveyed the exterior boundaries of said Lummi Indian Reservation on October 28, 1873, and subdivided the same on the same date and meandered the same on the 11th day of November, 1873, and returned to the Surveyor-general at Washington Territory on or about the 21st day of February, 1874, the field-notes of said survey and their map or plat of the same, and that said map or plat was by said surveyor-general examined and approved on the 21st day of February, 1874. That pursuant to instructions from the Commissioner of the General Land Office of the United States dated January 13th and March 31, 1883, for the allotment of Indian claims on said reservations and resurvey for said purpose and special instructions from the Surveyor-general of Washington Territory dated May 24th, 1883, issued under said instructions from the Commissioner of the General Land Office, said Lummi Indian Reservation was resurveyed on or about June 2d, 1884, by H. [17] B. Stewart,

United States Deputy Surveyor, and a map of the said Lummi Indian Reservation showing the exterior boundaries thereof and the subdivisions for allotments thereof and the allotments thereon returned to the said United States Surveyor-general of Washington Territory and by him examined, approved, and filed on the said 2d day of June, 1884. That no other survey has ever been made of the exterior boundaries of said Lummi Indian reservation in pursuance of the acts of Congress or by any official surveyor of the United States, or in pursuance of instructions from the Surveyor-general of the United States, or the United States Surveyor-general of the State of Washington; that none of the lands claimed by any of the defendants to this action lie within the exterior boundaries of said reservation as shown upon the map or plat made and executed by the said Reed, McCartney, Lindsley and Snow, or within the field-notes of their said survey, or within the exterior boundaries of the said Lummi Indian Reservation as shown upon the map or plat returned, filed, examined and approved, made by the said H. B. Stewart as aforesaid, nor within the field-notes upon which the same was based.

That no claim or assertion of title to any of the lands claimed by the said J. W. Romaine and Martha B. Romaine, his wife, Fred J. Wood and Anna Wood, his wife, Robert Shields and Augusta J. Shields, his wife; estate of A. J. Zane, or the executor of said estate, or the heirs at law thereto, or the estate of M. J. Clark or Ellen Clark, his widow, Philip Clark, or Mrs. Samuel Mayhew, or the executor

of the estate of M. J. Clark, or the heirs at law thereof, or C. M. Adams or Belle M. Adams, or at all, as part of said Lummi Reservation by the United States or at all, for over twenty years subsequent to the filing and approval of the said map of Lummi Indian Reservation made by the said H. B. Stewart, or at any time prior thereto and subsequent to the making, filing and approval of survey of said Reservation made by the said Reed et al. [18]

2.

Answering the allegations contained in paragraphs 2 and 3 of said bill of complaint, said defendants admit the same, but deny that any of the lands mentioned and described in said paragraphs 2 and 3 embrace any portion of the lands described in paragraphs 4, 5 and 6 of said bill of complaint.

3.

Answering the allegations contained in paragraphs 4, 5 and 6 of said bill of complaint, these defendants admit the same, and in this connection aver that in addition to the lands sold to M. J. Clark by the State of Washington, as set forth in paragraph 4 of said bill of complaint, the State of Washington did further on the 6th day of June, 1911, sell and convey to the said M. J. Clark, all tide lands of the second class lying between the line of mean low tide and extreme low tide in front of that portion of the Donation meander line described and set forth in said paragraph 4.

4.

Answering the allegations contained in paragraphs 7, 8, 9 and 10 of said bill of complaint, these answer-

ing defendants deny the same, each of the same, and each and every part thereof.

5.

Answering the allegations contained in paragraph 11 of said bill of complaint, these defendants admit that they claim and assert title and interest in said lands by virtue of deeds and contracts from the State of Washington, and assert ownership to the same; deny that said deeds and contracts from the State of Washington are void and unlawful; deny that said lands are within the boundaries of the Indian Reservation as alleged and set forth in said bill of complaint. [19]

6.

Answering the allegations contained in paragraph 12 of said bill of complaint, these answering defendants say that they have no knowledge of the facts therein alleged and set forth, and ask that complainant be held to strict proof of the same.

7.

Answering the allegations contained in paragraph 13 of said bill of complaint, these answering defendants admit that the lands described in said bill of complaint lie and are situate in Whatcom County, within the Northern Division of the Western District of the State of Washington, and within the jurisdiction of this court.

Further answering said bill of complaint and by way of cross-complaint thereto, said answering defendants allege:

1.

That all the lands described in paragraphs 4, 5

and 6 of complainant's bill of complaint herein are tide-lands situate within the county of Whatcom, State of Washington, wholly outside the boundaries of the Indian Reservation in said bill of complaint mentioned and referred to, or any Indian or other reservation of the Government of the United States, and that said lands and no part thereof have ever been embraced within the boundaries of such Indian Reservation or any reservation of the Government of the United States, and that at all times since the admission of the State of Washington to the Union of the United States of America in the year 1889, and prior to the 3d day of May, 1902, the absolute fee-simple title to all of said lands was vested in the said State of Washington, and so remained until the conveyances made by said State of Washington to the defendants herein and their predecessors in interest as set forth in said paragraphs 4, 5 and 6 of said complainant's bill of complaint. [20]

2.

That these answering defendants by reason of said conveyances from the State of Washington to said lands as set forth in said paragraphs 4, 5 and 6 of the bill of complaint herein and mesne conveyances from the grantee of said State of Washington to them are now the owners and holders of all the legal and equitable title in and to all of said lands, and that the complainant, the United States of America, is asserting claim and title to said lands both legal and equitable as an individual and as trustee for the tribe of Indians known as the Lummi Indian Tribe, and the Indian defendants named in the bill of com-

plaint herein, all of which claims constitute a cloud upon the title to defendants to their respective lands as in said bill of complaint and this cross-complaint set forth.

3.

That these defendants have no plain, speedy and adequate remedy at law whereby their title to said lands may be quieted and relieved of the pretended claim of said complainant as an individual and trustee as aforesaid.

WHEREFORE said answering defendants pray that all and singular the several conveyances, deeds and other instruments purporting on their face to convey an interest in and to the lands described in said bill of complaint and the cross-complaint herein to these several defendants, be decreed, valid, legal and binding, and that the claim of the complainant herein, both as an individual and trustee, in and to said lands and the whole thereof, be denied, and that the title of these answering defendants and each of them in and to the respective portions of said lands owned by them as hereinbefore set forth, be quieted as against the said complainant as an individual and trustee, and all persons claiming by, through or under it, or as beneficiaries of the alleged trust of said complainant. [21]

That complainant take nothing by its action herein, and that these answering defendants have and recover from said complainant their costs in this behalf laid out and expended, and that these answering de-

fendants have such other and further relief as in equity may seem meet.

J. W. ROMAINE,
C. E. ABRAMS,
H. W. ABBOTT,
A. M. HADLEY,

Attorneys for Jerome W. Romaine and Martha B. Romaine, His Wife; Fred J. Wood and Anna Wood, His Wife; Robert Shields and Augusta J. Shields, His Wife; Georgia Zane Bull, A. H. Zane, Clara B. Zane, Ellen Clark, Philip Clark, Katherine Mayhew, Charles M. Adams and Belle M. Adams, His Wife.

Service of the within answer is hereby acknowledged and admitted, and copy thereof received this 26th day of March, A. D. 1917, at Seattle.

CLAY ALLEN,
WINTER S. MARTIN,
Attorneys for Plaintiff.

[Endorsed]: Answer to Bill of Complaint and Cross-complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 26, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [22]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8-E.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE et al.,

Defendants.

Opinion.

Filed August —, 1917.

DECREE FOR DEFENDANTS.

CLAY ALLEN, U. S. Atty., WINTER S. MAR-
TIN, Asst. U. S. Atty., for Government.

HADLEY & ABBOTT, ROMAINE & ABRAMS,
For Defendants.

NETERER, District Judge:

The Government presents its bill in equity against a large number of defendants, in which it is alleged, in substance, that for a long time prior to 1855 it was seized and possessed of certain lands in and around the mouth of the Lummi River, since renamed Nooksack; that on the 22d of January, 1855, the plaintiff, through Governor Stevens, entered into a treaty with the chiefs, head-men and delegates of various Indian tribes in Washington Territory, in which it was provided, among other things:

* * * “and the Island called Cha-Choo-
Sen, situated in the Lummi River at the point
of separation of the mouths emptying respec-
tively into Bellingham Bay and the Gulf of
Georgia, * * * was reserved for the use
and occupation of said bands of Indians”;

that it is further provided that said tract should be set apart, and as far as necessary surveyed and marked out for the exclusive use of said Indians; that on the 22d of November, 1873, President Grant, pursuant to such provision, made proclamation establishing Lummi Indian Reservation; that since that time the said lands [23] have been devoted within the exterior boundaries of said reservation to the exclusive use and occupation of the Lummi and other allied tribes; that on and after the 28th of March, 1902, the State of Washington offered for sale and sold to various named defendants all the tidelands of the second class situated in front of and adjacent to various upland tracts east of the Nooksack River; that all of the lands so sold and in the bill of complaint described "lie within the exterior boundaries of the Lummi Indian Reservation as the same was established"; and that the several contracts and deeds issued by the State, cloud, encumber and injure the plaintiff's title, and serve to annoy, harass and disturb the plaintiff in the quiet and peaceful enjoyment of said lands for the use and benefit of said Indians; and prays a decree that the cloud may be removed from such title and the defendants adjudged to be without interest.

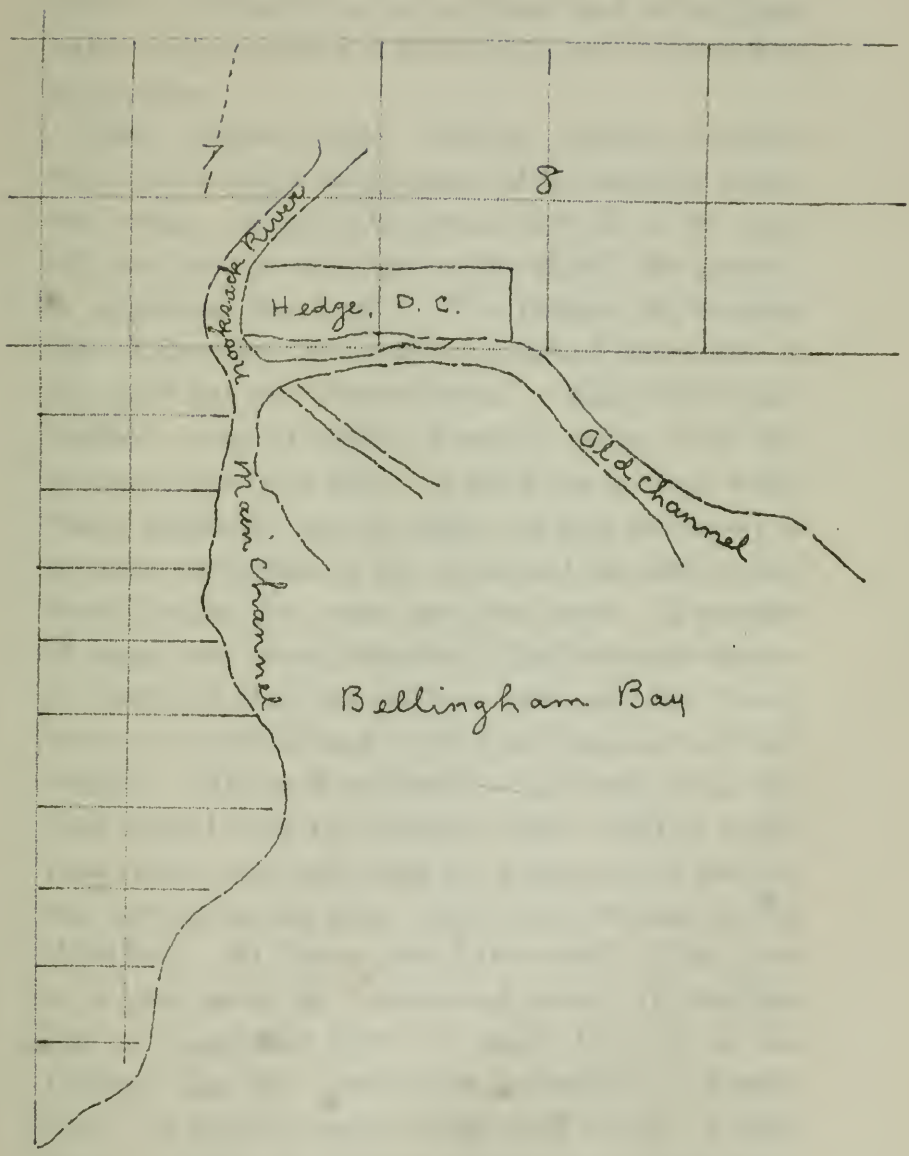
The defendants appear and deny the equities of the bill, and allege that the lands referred to are without the Indian Reservation, and

"No part thereof have ever been embraced within the boundaries of such Indian Reservation or any reservation of the Government of the United States, and that at all times since the

admission of the State of Washington to the Union of the United States of America, in the year 1889, and prior to the 3d day of May, 1902, the absolute fee simple title to all of said lands was vested in the State of Washington, and so remained until the conveyances made by the said State of Washington to the defendants and their predecessors in interest * * * ;”

and pray that the defendants may be decreed to be the lawful owners.

The chief point of contention between the plaintiff and the defendants in this case is the location of the mouth of the Nooksack River, that having been a term employed in the treaty [24] between the Government and the Indians, the defendants contending that the mouth of the river is in the vicinity of two cottonwood trees referred to in the testimony, a short distance to the south or southeast from the southwest corner of the Hedge Donation Claim. The Government contends that the mouth of the river is some considerable distance to the east or southeasterly from this point, near a place referred to in the testimony as “Treaty Rock,” being a point about a mile and one-half or two miles from the point claimed as the mouth of the river by the defendants, following the sinuosities of the shore. It is further contended by the Government that the executive order of the President establishing the Lummi Indian Reservation extended the reservation to low-water mark on the shores of the Gulf of Georgia, and it being extended to the low-water mark would control the entire reservation. The following map gives an idea of the location: [25]



The land between the old channel and the main channel marked on the map is all tide-lands comprising several hundred acres; is submerged during high water and uncovered at low water, and is devoted to no purpose.

Many witnesses have testified. Indians testified who claim to have been present at the time the treaty was made. Albert Descamun, now 75 or 80 years old, says he is a son of one of the chiefs who assisted to negotiate the treaty. The Indians all testified that at the time the treaty was signed the mouth of the river was at "Treaty Rock." Many white men testified, none of whom, however, were upon the ground as early as 1855. I think the earliest white man's testimony was in 1868, and this testimony is as to the conditions of the water and the land in this vicinity after they came upon the scene. A number of maps have been presented; filed notes of surveyors Smith & Hurd as early as 1859, and Mr. Snow, who surveyed this land in 1872, and was in court and testified. He spent as much as six weeks upon this land, talked with the Indians with relation to the reservation and told them his mission, and that he was surveying the land under the direction of the President. Mr. Snow places the mouth of the river at a point near the cottonwood trees. He testifies that no suggestion was ever made by any of the Indians that the reservation extended to "Treaty Rock" or that the mouth of the river was at "Treaty Rock"; or that the Indians claimed any of this land; and at the time of the survey the main body of the water found its way into the bay along the easterly

shore of the Lummi Reservation, on the west side of Bellingham Bay, and not through the eastern outlet which has been designated in the testimony and is known as "Steamboat Slough." None of the white men ever heard of "Treaty Rock" prior to this [27] trial. All testified as to the flow of the water directly south from the Nooksack River into the bay, and through "Steamboat Slough," and that the mouth of the river was always considered to be in the vicinity of the cottonwood trees. No possession was at any time taken of the land in dispute by the Indians or any Indian agent, nor any use made of this land. The plat in evidence of lands surveyed by Smith & Hurd in 1859 shows three channels; old channel, middle channel, and a main channel; the old channel being the easterly channel now known as "Steamboat Slough," and the main channel being on the "westerly side of Bellingham Bay along the eastern shore of Lummi Island, and the middle channel about halfway between. On page 1 of the field-notes of the survey of the Hedge Donation Claim, dated March 15, 1861, we find the following:

"Beginning at the SE. corner of the claim the same being 5 chains west of qr. post on line between Sections 8 and 17 * * * . This corner is under water at high tide and is also overflowed at times by the river; thence with the meanders of the beach, variation 22 deg. 15' east, south 1.75 chains, north 89½ deg. west 35.15 chains to the post corner to fract. sections 17 and 18; thence in section 18 south 73½ deg. west 24.18 chains to mouth of Lummi River,"

clearly indicating that in 1861, five years after the conclusion of this treaty, the mouth of the river was to the west of the Hedge Donation Claim, and the designation in the field-notes would place it in the vicinity of the cottonwood trees, as testified to by the witnesses for the defendants. All of the evidence and circumstances presented, except the bare statement of the Indians, indicates that the mouth of the river was as contended for by the defendants. The upland boundaries of the river ceased at the cottonwood trees, and from that point the waters of the river mingled with the salt water and found its way into the bay through the several outlets over the tide flat.

It is contended by the defendants that no part of the tide-lands [28] surrounding the reservation were ever granted to the Indians; that under the treaty the reservation was limited to the "Island called "Cha-Choo-Sen situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia," and that the rule is well established that grants made by the Government of public lands bounded on streams or navigable or non-navigable waters, without reservation or restriction, are to be construed according to the effect and in accordance with the laws of the State in which the land lies, and where there is no State, that the common-law rule obtains, which is that the shore between high and low water belongs to the State and consequently grants or conveyances of land bounded on tide water are presumed to extend to high-water mark only, citing

9 Corpus Juris, 181; *Barney v. Keokuk*, 94 U. S. 324; *U. S. v. Phascheco*, 2 Wall. 587; and *Mann v. Tacoma Land Co.*, 153 U. S. 273. This, I think, is a correct statement.

No title to any of the lands in the reservation vested in the Indians until allotment and issuance of patent in severalty. Their right was merely possessory uses for subsistence. *State v. Towessnute*, 89 Wash. 478. The exclusive rights of the Indians were terminated by the Oregon Donation law, and were relinquished by them by the treaty of 1855, and until Washington was admitted as a State the United States held the title to the shores and beds of navigable waters as trustees for the State, *Pollard v. Hagen*, 3 Howard 212; *Shively v. Bowlby*, 152 U. S. 1. Neither the reservation nor the executive order of the President was a grant. The President, under section 6, retained the power of removal of the Indians from the reservation and to consolidate them with other friendly tribes, or select other lands, and construing the executive order in connection with the treaty which did not include the tide-lands, the order must be held as contemplating only such [29] land as was included in the treaty, and in harmony with the law, as the description commenced at the mouth of the Lummi River, which is a point where the fresh water mingles with the waters of the sea — *Gould on Waters*, 2d ed., sec. 41—and no effect can be given to the words “low-water mark on the Gulf of Georgia,” as the boundary could not be low water on one side of the Island and high water on the other. No rights having been reserved to the tide-lands in

the treaty, the Indians not being seized with title to the lands, *Johnson v. McIntosh*, 8 Wheaton, 543; *Butts v. N. P. Ry. Co.*, 119 U. S. 55; *U. S. v. Ashton*, 170 Fed. 509; nor granted rights by virtue of treaty reservations. No claim can rest upon the executive order, since it was revokable, and was followed by survey and actual marking upon the ground by the Government of the lands determined, as testified to by Mr. Snow, whose survey was returned and approved, constituting the final act with relation to such executive order. In the case of official surveys, it will always be presumed that the surveyor did his duty, and that his work was correct. 9 *Corpus Juris*, 272.

It is urged by the Government that the hydrographic maps offered constitute official data corroborating the testimony of the Indians, and show the river to run out past "Treaty Rock" to the tidelands. I do not think that the hydrographic maps are of any weight in this testimony in contradiction to the evidence that is presented, including the surveys that were made and the actual conditions upon the ground, as delineated by the testimony of witnesses.

Decree for defendants may be taken.

JEREMIAH NETERER,

Judge.

[Endorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 4, 1917. Frank L. Crosby, Clerk. Edith A. Handley, Deputy. [30]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—E.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife; FRED J. WOOD and ANNA
WOOD, His Wife; ROBERT SHIELDS
and AUGUSTA J. SHIELDS, His Wife;
GEORGIA ZANE BULL; A. J. ZANE and
CLARA B. ZANE; ELLEN CLARK;
PHILIP CLARK; KATHERINE MAY-
HEW; JOHN WILLIAMS; MATILDA
FRANCES; EDWARD WARBASS; PHIL-
IP BOB; HARRY PRICE; HENRY SEN-
IOR and DANIEL CUSH; and All Persons
Claiming an Interest in the Property Herein
Described,

Defendants.

Decree.

This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED, as follows:

1.

None of the lands involved in this action or embraced within the following descriptions numbered a, b, c and d, respectively, lie within the exterior

boundaries of the Lummi Indian Reservation, in Whatcom County, State of Washington, nor constitute a part of said reservation or any reservation, nor constitute any part of the public domain of the United States of America.

“a” “All tide-lands of the second class, situate in front of, adjacent to, or upon the following portion of the Government meander line of the J. G. Hedge Donation Claim in Sections 17 and 18, Township 38 North, Range 2 East of the Willamette Meridian, in Whatcom County, Washington. Beginning at post corner to fractional sections 17 and 18, said township and range; thence with the Donation Claim meanders in Section 18 as follows: South 31 East 0.70 chains; South $25\frac{1}{4}$ East, 0.65 chains; South 15 45' East 1.07 chains; South 38 45' East 3.06 chains; South $50\frac{1}{4}$ East 4.34 chains; South $72\frac{1}{4}$ East 5.37 chains; North $73\frac{1}{2}$ East 24.18 chains to post corner to fractional sections 17 and 18, said Township and Range; thence with the donation meanders in said Section 17 South $89\frac{1}{2}$ East 12.00 chains, and having a total frontage of 51.37 lineal chains. [31]

“b” “Begin at a point 68.06 chains South and 22.05 chains West from the corner common to Sections 7, 8, 17 and 18, Township 38 N. R. 2 E. W. M. in Whatcom County, Washington, and running thence South 12 deg. 42' East 8.57 chains; South 22 deg. 41' East 21.31 chains; East 112.16 chains; North 51.10 West 37.00 chains; North 0 deg. 41' East 7:58 chains; South

83 deg. 41' West 8.45 chains; North 47 deg. 31' West 10.41 chains; North 2 deg. 02' East, 18.26 chains; North 18 deg. 24' West 5.30 chains; North 46 deg. 58' West 14.39 chains; North 16 deg. 29' West 12.55 chains; North 60 deg. 10' West 8.98 chains; South 50.00 chains; West 57.29 chains, to the place of beginning, containing 376.63 acres."

"c" "Beginning at a point 3.00 chains South and 1.25 chains West of the corner common to Sections 7, 8, 17 and 18, T. 38 N. R. 2 E. W. M. in Whatcom County, Washington; running thence North 89 deg. 11' East 19.58 chains; S. 42 deg. 22' East 2.05 chains; South 59 deg. 52' East 2.79 chains; South 67 deg. 05' East 9.10 chains; South 79 deg. 05' East 2.00 chains; South 24 deg. 05' East 3.26 chains; South 15 deg. 05' East 5.60 chains; South 50.00 chains; West 57.29 chains; North 12 deg. 42' West 33.21 chains; North 7 deg. 02' West 3.80 chains; North 0 deg. 02' West 8.61 chains; North 14 deg. 07' West 11.33 chains; North 16 deg. 58' East 1.51 chains; North 59 deg. East 1.14 chains South 37 deg. 47' East 1.16 chains; South 71 deg. 51' East 0.82 chains; North 39 deg. 39' East 1.04 chains; South 77 deg. 16' East 3.29 chains; South 72 deg. 07' East 3.00 chains; South 62 deg. 21' East 1.33 chains; South 47 deg. 16' East 4.42 chains; South 82 deg. 12' East 1.30 chains; South 67 deg. 41' East 3.46 chains; South 83 deg. 06' East 2.57 chains; North 85 deg. 03' East 1.44 chains; North 6 deg. 17' East 3.40 chains; North 50 deg.

47' East 4.10 chains; North 1 deg. 41' East 1.14 chains; North 23 deg. 59' East 1.94 chains; North 29 deg. 59' East 2.48 chains; North 36 deg. 52' East 1.58 chains; North 41 deg. 52' East 1.71 chains; North 49 deg. 57' East 1.41 chains, to the place of beginning, containing 375.50 acres.

“d” “All tide-lands of the second class lying between the line of mean low tide and extreme low tide in front of that portion of the meander line of the J. G. Hedge Donation Claim in Sections 17 and 18, Township 38 North, Range 2 East of the Willamette Meridian, in Whatcom County, Washington, described and set forth in Sub-division “a.”

2.

None of the lands owned or claimed by the defendants herein and involved in this action, lie within the exterior boundaries of said Lummi Indian Reservation, or constitute a part of such Reservation, or any Reservation or any part of the public domain of the United States.

3.

Plaintiff has no right, title, claim or interest in any [32] capacity whatsoever, in and to any of the lands involved in this action, nor described in said descriptions a, b, c and d, respectively, of paragraph 1 of this decree or in and to any of the lands of the defendants J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood his wife; Robert Shields and Augusta J. Shields, his wife; George Zane Bull; A. J. Zane, and Clara B. Zane; Ellen Clark; Philip Clark, and Katherine

Mayhew, involved in this action.

4.

Defendants John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush have no right, title, claim or interest, individually or otherwise, in and to any of the lands described in subdivisions a, b, c and d, of paragraph 1 of this decree, or in and to any of the lands of the said J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull; A. J. Zane; Clara B. Zane; Ellen Clark; Philip Clark and Katherine Mayhew, involved in this action.

5.

Title of the defendants, J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull; A. J. Zane; Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, in proportion to their respective interests in and to the lands described in subdivisions a, b, c and d, respectively, of paragraph 1 of this decree, and in and to all of the lands involved in this suit is forever quieted as against plaintiff individually or as trustee or otherwise, and as against all persons claiming or to claim, by, through or under plaintiff, or as beneficiary of plaintiff, other than the particular defendants in this paragraph named.

[33]

6.

Title of defendants, J. W. Romaine and Martha

B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields his wife; Georgia Zane Bull; A. J. Zane; Clara B. Zane; Ellen Clark; Philip Clark and Katherine Mayhew, in proportion to their respective interests in and to the lands described in subdivisions a, b, c and d respectively, of paragraph 1 of this decree, and in and to all of the lands involved in this suit, is forever quieted as against the defendants John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush, and as against all persons claiming by, through, or under them or any of them.

7.

Plaintiff shall take nothing by its action herein, and its action is hereby dismissed with prejudice.

JEREMIAH NETERER,

District Judge.

ROMAINE & ABRAMS.

O. K.—HADLEY & ABBOTT.

[Endorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 22, 1917. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [34]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife; FRED J. WOOD and ANNA
WOOD, His Wife; ROBERT SHIELDS
and AUGUSTA J. SHIELDS, His Wife;
Estate of A. J. ZANE Together With the
Executors Thereof and the Heirs at Law
Thereto When the Same Shall be Determined,
Estate of M. J. CLARK, ELLEN CLARK,
His Widow, PHILIP CLARK and Mrs.
SAMUEL MAYHEW, Together With the
Executor of the Estate of Said M. J. CLARK
and the Heirs at Law Thereto When the
Same Shall be Determined, C. M. ADAMS
and BELLE M. ADAMS, His Wife, JOHN
WILLIAMS, MATILDA FRANCES, ED-
WARD WARBASS, PHILIP BOB,
HARRY PRICE, HENRY SENIOR and
DANIEL CUSH, and All Persons Claiming
an Interest in the Property Herein
Described,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, Judge
of said Court:

Comes now the above-named plaintiff, United States of America, and, feeling itself aggrieved by the final decree made and entered in the above-entitled court and cause on the 22d day of October, 1917, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed [35] herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

CLAY ALLEN,
United States Attorney,
DONALD A. McDONALD,
Assistant United States Attorney,
Solicitors for Plaintiff.

[Endorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 13, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [36]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife; FRED J. WOOD and ANNA
WOOD, His Wife; ROBERT SHIELDS
and AUGUSTA J. SHIELDS, His Wife;
Estate of A. J. ZANE Together With the
Executor Thereof and the Heirs at Law
Thereto When the Same Shall be Determined,
Estate of M. J. CLARK, ELLEN CLARK,
His Widow, PHILIP CLARK and Mrs.
SAMUEL MAYHEW, Together With the
Executor of the Estate of Said M. J. CLARK
and the Heirs at Law Thereto When the
Same Shall be Determined, C. M. ADAMS
and BELLE M. ADAMS, His Wife, JOHN
WILLIAMS, MATILDA FRANCES, ED-
WARD WARBASS, PHILIP BOB,
HARRY PRICE, HENRY SENIOR and
DANIEL CUSH, and All Persons Claiming
an Interest in the Property Herein
Described,

Defendants.

Assignment of Errors.

And now, on this, the 13th day of February, A. D.
1918, comes the plaintiff by its solicitors, Clay Allen,

United States District Attorney for the Western District of Washington and Donald A. McDonald, Assistant United States Attorney for said district, and says that the decree entered in the above cause on the 22d day of October, A. D. 1917, is erroneous and unjust to the plaintiff.

First. Because said District Court erred in the ruling made by it that the certified copy of contract and bond (Defendants' Exhibit "H") dated August 16, 1873, between the United States Surveyor General and Reed, McCartney, Lindsey and Snow, United States Deputy Surveyors for upland survey of Lummi Indian Reservation, was admissible in evidence. [37]

Second. Because said District Court erred in the ruling made by it that the survey of Lummi Indian Reservation made by Joseph M. Snow under contract No. 174 in 1873 (Defendants' Exhibit "G") was admissible in evidence.

Third. Because said District Court erred in the ruling that the letter dated January 13, 1883, from the Commissioner of the General Land Office, United States Surveyor General at Olympia, Washington, containing instructions pertaining to the resurvey of Lummi Indian Reservation (Defendants' Exhibit "I") was admissible in evidence.

Fourth. Because said District Court erred in the ruling made by it that the letter dated March 31, 1883, from the Commissioner of the General Land Office to the United States Surveyor General containing instructions pertaining to the resurvey of Lummi Indian Reservation (Defendants' Exhibit

“J”) was admissible in evidence.

Fifth. Because said District Court erred in the ruling made by it that the authenticated tracing of the resurvey of the Lummi Indian Reservation made in 1883 (Defendants' Exhibit “K”) was admissible in evidence.

Sixth. Because said District Court erred in the ruling made by it that the Donation claim plat of township 38 north, range 2 east, W. M., Washington (Defendants' Exhibit “L”) was admissible in evidence. [38]

Seventh. Because said District Court erred in finding from the evidence that the mouth of the Nooksack River was at the cottonwood trees as contended by defendants, and not at “Treaty Rock.”

Eighth. Because said District Court erred in finding and adjudging that no part of the tide-lands surrounding the Lummi Indian Reservation was ever granted to the Indians.

Ninth. Because said District Court erred in not finding and adjudging that all tide-lands surrounding the Lummi Indian Reservation were made a part thereof by the treaty and reserved thereto by the Presidential Proclamation of 1873.

Tenth. Because said District Court erred in not finding and adjudging that all purported sales of tide-lands adjacent to the Lummi Indian Reservation by the State of Washington were void and cancelling deeds issued to defendants, J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull, A. J. Zane

and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew.

Eleventh. Because said District Court erred in finding and adjudging that the Snow survey of 1873 was conclusive, in fixing the boundaries of the Lummi Reservation, according to the upland meander lines arbitrarily placed there by Snow without regard to the treaty rights and the express and specific calls of Proclamation granting the tidelands. [39]

Twelfth. Because the said District Court erred in finding and adjudging that the lands mentioned in paragraph one of its decree lie without the exterior boundaries of the Lummi Indian Reservation.

Thirteenth. Because the said District Court erred in finding and adjudging that the lands claimed by defendants herein, namely, J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull, A. J. Zane and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, lie without the exterior boundaries of the Lummi Indian Reservation.

Fourteenth. Because of the said District Court erred in finding and adjudging that the plaintiff has no right, title, claim or interest in any capacity whatsoever, in and to any of the lands involved in this action.

Fifteenth. Because the said District Court erred in quieting title in the defendants J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and

Augusta J. Shields, his wife; Georgia Zane Bull; A. J. Zane and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, to the lands involved in this suit against the claim of plaintiff.

Sixteenth. Because the said District Court erred in quieting title in the defendants J. W. Romaine and Martha B. Romaine, his wife; Fred J. Wood and Anna Wood, his wife; Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull; A. J. Zane and Clara B. [40] Zane; Ellen Clark, Philip Clark and Katherine Mayhew, to the lands involved in this suit against the claim of defendants John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush.

Seventeenth. Because the said District Court erred in dismissing the bill instead of decreeing that plaintiff's title be quieted to said lands as prayed for by plaintiff and in not granting the relief prayed for by plaintiff generally.

WHEREFORE the plaintiff prays that the said decree be reversed and the District Court directed to enter such decree as is prayed for by said bill.

CLAY ALLEN,

United States Attorney,

DONALD A. McDONALD,

Assistant United States Attorney,

Solicitors for Plaintiff.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 13, 1918. Frank L.

Crosby, Clerk. By Edith A. Handley, Deputy.
[41]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and Anna
WOOD, His Wife, ROBERT SHIELDS and
AUGUSTA J. SHIELDS, His Wife, ES-
TATE OF A. J. ZANE, Together With the
Executor Thereof and the Heirs at Law
Thereto When the Same Shall be Deter-
mined ESTATE OF M. J. CLARK, ELLEN
CLARK, His Widow, PHILIP CLARK and
MRS. SAMUEL MAYHEW, Together With
the Executor of the Estate of Said M. J.
CLARK and the Heirs at Law Thereto When
the Same Shall be Determined, C. M.
ADAMS and BELLE M. ADAMS, His Wife,
JOHN WILLIAMS, MATILDA FRANCES,
EDWARD WARBASS, PHILIP BOB,
HARRY PRICE, HENRY SENIOR, and
DANIEL CUSH, and all Persons Claiming
an Interest in the Property Herein De-
scribed,

Defendants.

Order Allowing Appeal.

The above-named plaintiff, having heretofore filed herein its petition for appeal from the final decree herein and having filed its assignment of errors,—

NOW, THEREFORE, it is hereby ORDERED that said petition be granted and the said appeal is hereby allowed, without bond.

Dated this 13 day of February, 1918.

JEREMIAH NETERER

United States District Judge.

[Endorsed]: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 13, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [42]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE et ux., et al.,

Defendants.

Plaintiff's Proposed Statement of Testimony.

CLAY ALLEN, United States Attorney, DONALD A. McDONALD, Assistant United States Attorney, Solicitors for Plaintiff. [43]

Statement of Testimony.

The plaintiff offered in evidence the following instruments:

Recognizance map Bellingham Bay made in 1856 by the Hydrographic Branch of the United States Navy Department (Plaintiff's Exhibit 1).

Sheet No. 9 United States Coast and Geodetic Survey, showing lower part of Nooksack River, made in 1887 (Plaintiff's Exhibit No. 2).

Geological Survey of the Blaine Quadrangle, made in 1900 (Plaintiff's Exhibit 3).

Exhibits 1 and 2 were objected to by the defendants on the ground of incompetency, defendants' counsel further stating that the maps are hydrographic maps and that this action is confined to exterior boundaries of the Lummi Indian Reservation. That a hydrographic map is not made from any field-notes of the upland or from any data whereby points are fixed according to the United States rules governing surveys which are a part of the general law of the land and which govern all surveys of upland of the United States and likewise govern the making of state surveys where they attempt to follow the lines of the United States Government surveys. That the maps in question pertain to the waters of Bellingham Bay and do not claim to set forth or contain the exact delineation of the upland. And for the further reason that said maps are not the best evidence. That the original survey of Joseph M. Snow in 1873, being the only official survey of the exterior boundaries of the

Indian Reservation is the original and best evidence. The maps offered being subsequent to the Snow survey. Also that the survey of Harvey B. Stewart, United States Deputy Surveyor, in 1884, which was an official survey of the exterior boundaries for the purpose of subdividing for allotment, [44] is better evidence than the maps offered. The Snow and Stewart surveys are of public record in the United States Land Office, of which this court will make judicial knowledge, were made in accordance with the instructions of the United States Surveyor General, and in each instance have been approved as in accordance with the field-notes of the exterior boundaries of the Lummi Indian Reservation, while the hydrographic maps offered do not purport to be based upon any field-notes or to be made under any instructions to survey the exterior boundaries of said Reservation by authority of the United States.

That objection to Plaintiff's Exhibit No. 3 was made by the defendants on the ground that it appears that the proposed survey was made in 1906 and was not properly authenticated; that it does not purport to show that it is topographic and does not show and does not purport to show the exterior boundaries of said reservation, and is not one on which the exterior lines are run in accordance with the rules governing surveys of the United States and is not the best evidence, the best evidence being the original survey of Snow and others in 1873, and the resurvey for the purpose of allotment by Stewart, in 1884. Ruling thereon was reserved.

Testimony of Capt. George R. Campbell, for the Government.

Capt. GEORGE R. CAMPBELL was called in behalf of plaintiff, and testified that he was a member of the United States Engineers recently appointed; that he had had seventeen years experience in all classes of engineering and surveying work; that he was qualified and on the Government's accepted list of hydrographic surveyors and engineers as well as civil or land engineers. He testified that pursuant to instructions from Washington, he was ordered to survey the north and east boundaries of the Lummi Indian Reservation, with a special assignment to report to the office of United States Attorney for the purpose [45] of doing such survey work and making such maps and exhibits as the United States Attorney might desire for the purposes of the trial. He testified that he reported about the middle of June, and was on the ground ten days from the 21st of June; that he had the benefit of the Snow Survey field-notes, the resurvey notes of Stewart and other Government notes which apparently related to the Hedges Donation Claim, although the same were not entitled or labeled as such. He testified that after careful measurement on the ground at the request of the United States Attorney, he then made map showing the lands at the mouth of the Nooksack River, which map was offered in evidence as Plaintiff's Exhibit 4, and fixed the various points noted thereon concerning which evidence was introduced during

(Testimony of Capt. George R. Campbell.)

the trial. The witness testified that he went upon the lands with plaintiff's counsel and witnesses and testifies as to the accuracy of Plaintiff's Exhibit 4 by actual measurement of these various points, fixing definitely on exhibit 4 the cotton wood trees, the cedar stump, the Catholic Church, the old mill, McDonough's wharf and store, and the several channels of the Nooksack with section lines and references showing the relative position of defendant's grants to the adjoining upland and to the main river with its several sloughs or mouths. When asked concerning the dotted line which was marked as the old channel from 1855 to 1888 he answered, "Well, we started to trace out the survey from the Cedar stump where the Indians had testified the old channel [46] was located, the original channel, and then we followed easterly."

Q. (The COURT.) Did you put that line on the map from the testimony of the Indians or from the surveys you made?

A. By extending the surveys on the ground too. You can see on the ground that is plain.

Capt. Campbell testified that he designated the old river as 1855 to 1888 which ran from the cedar stump easterly in a parallel line with the Hedges Donation Claim over to McDonough's store, and thence southerly out to the sea. He also put in the boundaries [47] of the Hedges Donation Claim, so that its position is clearly shown in *justi*-position to the grants of the defendants, the section corner in the adjoining section up as far as section

(Testimony of Capt. George R. Campbell.)

8, two or three miles up the river in order to show the course of the river during the time from 1855 to date. He also stated that he fixed the channel of the river, and traced it on exhibit 4 during the period from 1889 to 1908, and so marked it where the flow is shown to have run from the cedar stump in a southerly direction parallel to the shore meandering line south to Fish Point.

He further marked the three courses of the river from 1908 to date, showing it to run from a point up in section 8 almost due south past McDonough's store out to Treaty Rock. He shows further a line of piling at the point of the cedar stump, and traces the course of the old river under the designation 1855 to 1888, to its present intersection with which is referred to in the testimony as the Zane River.

Capt. Campbell further testified that the two cottonwood trees may be roughly estimated at forty feet high, and that these trees are the only trees which grow in the surrounding country, and afford a distinct land mark for a guide to the survey of the other points designated. He testified further that during his work on the reservation, that he was attended by witnesses who later testified in the case, namely, Peter James, Thomas Jefferson, Solomon Balch, D. H. Evans, the photographer, Henry Kivina, George Tsilano, George [48] Bremer, Dr. Buchanan and others. He testified that he was there with Mr. Evans when the photograph of the delta was made, which photograph was later admitted as Plaintiff's Exhibit 5. He fixes also the

(Testimony of Capt. George R. Campbell.)

position of the cedar stump with accuracy, and testifies that there is no other stump in the vicinity. He testifies concerning the point marked "old scow."

In testifying in response to a question as to how he ascertained the present position of the old channel referred to as 1855 to 1888, he stated that he was able to fix the same from the physical conditions showing the old bench of this stream or slough, aided by the testimony of the old Indians mentioned who accompanied him in his investigating trip over the ground at the mouth of the Nooksack. Asked as to what he found on the ground, he stated that he commenced at the cedar stump to trace the river boundaries easterly, found well-defined channel, found old stumps, trees on the edges of the old banks, sure it was the old bank, delineated the course of the old river on the map from the cedar stump to its confluence with the mouth of the new river or Zane River. At the point of intersection of the old channel and the Zane River, he found a shack which he marked on the diagram at west and north bank of the old river, where it joins the present river. He testifies that he placed a flag at a point a little to the [49] west of this point; that the old river channel cuts across the land, and on the present easterly bank of the Zane River intersects the same at a point where there is a big stump; that the old channel mark is well defined on the present banks of the Zane River.

He found also the remains of an old saw mill,

(Testimony of Capt. George R. Campbell.)

foundation, etc., and refers to it as a shingle mill on the diagram. He shows a distinct slough which runs up from the Zane River back of the shingle mill up above McDonough's store. He testifies that there were old stumps of trees on the bank indicating that the old channel ran from the cedar stump to the Zane River outlined on the map, referred to as 1855 to 1888 to his satisfaction at the time he made his investigation. He testified also that he has traced McDonough's store and the course of the Zane River out to Treaty Rock, as well as the rock itself, on the map. He testified that the low part of the Zane River from McDonough's store out toward the rock is now a series of sand bars, and the water gradually deepens as it runs out. Solid land extends from the middle of section 17 west and north, and the northeast quarter of section 17 is solid land except for the river channel. A slough which is not navigable and contains very little water except in freshet periods is delineated on the map at a point lying between the Zane River, or as other witnesses testify, Steamboat Slough, and the other slough which runs south from the cedar stump and Catholic Church to Fish Point. Witness refers to this little slough as the "middle slough"; has marked the location and also location of Harry Price's shack; that the map [50] is drawn to scale and shows the relative position of the several objects to each other. He has also delineated on Plaintiff's Exhibit 4 as far as possible the several tide-land grants to the defendants by the State of

(Testimony of Capt. George R. Campbell.)

Washington. The outer edges or seaward or bay side of these grants could not be put in for the reason that the courses of the same by metes and bounds would place their outer boundaries out on salt water. They are shown, however, as far as they are uncovered at low tide. He also put in the line to low tide. He states that he places the mouth of the Nooksack River according to the physical evidence on the ground as at Treaty Rock; that there is a well-pronounced current there at the present time, but that you have to follow this channel up west toward McDonough's wharf before the bank on the west or south side of the same is shown to any considerable extent. At certain conditions of the tide, you can only see the sand spit opposite Treaty Rock. Opposite McDonough's wharf there is a distinct bank exposed to view, which is not covered at high tide.

He testified further that the current in the Zane River is well defined as it flowed out past Treaty Rock, and that it appears to flow in a well-defined channel, because he found sand banks to the westward of Treaty Rock across Little Slough down in section 18; that all this southeasterly portion of the land lying between these two river mouths is shallow, although the high tide comes in over a portion of it. The solid land extends from the [51] middle of Section 17 west and north. He designates the middle slough as being merely a tidal slough of minor importance. Witness delineated the Hedges Donation Claim on Plaintiff's Exhibit

(Testimony of Capt. George R. Campbell.)

4, and also the Clark land purchased north of the Hedges Donation Claim. He found evidence of a juncture or branch of the Nooksack River at a point near the quarter section line of the southwest quarter of Section 8, and triangulated the forks at that place, finding well-defined evidence of physical juncture on the ground. From this point near the quarter section line in the southwest quarter of Section 8, he has shown the river as it flowed in the time between 1855 and 1888, locating the same in accordance with the field-notes, as well as by the well-defined banks of the same, and so marked it on the plat, known as Plaintiff's Exhibit 4.

At the cedar stump near the cottonwood trees, witness testified he found evidence of the piling is accurately located on the map. [52] He testified that the location of these rivers with the physical evidence which he found on the ground led him to the conclusion that the cottonwood trees and cedar stump mark the course of the old river at that point where it took a right-angled turn and flowed easterly toward McDonough's wharf, and he so delineated the same on Plaintiff's Exhibit 4.

This witness fixed the position of the so-called Zane River on Plaintiff's Exhibit 4 as commencing at the quarter section point above referred to in Section 8, and flowing in a southeasterly direction down to the point where it met the 1855-1888 old river-bed, thence from this point past McDonough's wharf out to Treaty Rock and Bellingham Bay. He found that some of the water of the main river

(Testimony of Capt. George R. Campbell.)
still continues to flow through the 1889-1908 river, but that this flow of water is now a minor slough taking the overflow from the waters which leave the main river at a point up in Section 8.

On cross-examination Capt. Campbell stated that he did not follow the field-notes of the Snow Survey, his official instructions being to resurvey the north and east boundaries of the Lummi Indian Reservation, and to do such work as the United States Attorney's office as superintendent of the Indian Reservation desired to have done for [53] the purposes of this suit. That he has not run the eastern exterior boundary in accordance with the Snow survey except to go over it and did not set any posts. He located the corners of Sections 7, 8, 17 and 18 from the resurvey of the Hedges Donation Claim; that he had the original Government notes, and found the corners as described in said resurvey notes. He was asked concerning the initial point of the Snow survey. He stated, "I really don't know. I cannot say where Mr. Snow started his survey"; that he had not definitely fixed the same, and appears to have used the several sets of Government field-notes furnished him, without having any definite instructions to prefer one over the other. Witness does not claim that his map is in any sense a copy of an official survey.

Witness fixed the present mouth of the river at Treaty Rock, and stated that the mainland extends approximately half way down through Section 17 to

(Testimony of Capt. George R. Campbell.)

a point referred to in Plaintiff's Exhibit 4, where the word "Present" is written on the same. He stated that he did not fix the mouth of the river from the standpoint of high water. That he did not attempt to determine how far the mainland extended down through section 17 from the standpoint of ordinary high water.

Referring to the old river delineated on exhibit 4 as the 1855-1888 river, witness admitted that he had heard the same called "Steamboat Slough." That portions of the channel that have been referred to as "Steamboat Slough" are filled up. He admitted that it was perhaps possible that the Zane River or the river as it runs in its present course out to Treaty Rock might have cut through the mud banks on its way out, although in his opinion these banks were formed by the action of the old river between the years 1855 to 1888. He was asked whether or not he was in fact placing the original channel as indicated on exhibit 4 upon his testimony. He replied that he did not attempt to testify as to when that was the channel except by the testimony on the ground pointed out by the witnesses. He was asked, [54] "So from your own knowledge you do not attempt to make any statement in that connection?" A. "No, I could not do that without the testimony."

He testified that the present or Zane River is from three to five chains in width, and went in a nearly straight course from a point where it commenced up in Section 8. He was interrogated at some length as to whether he followed the field-notes of the Snow

(Testimony of Capt. George R. Campbell.)

Survey, saying that he had two or three sets of field-notes, and that his instructions were to locate the corners and establish missing corners as well as he could, using field-notes as a whole. He stated that he followed around Point Francis, but did not attempt to follow the line as shown by the Snow Survey. He simply made a reconnaissance of that region seeming to be in the boundary lines of 36, 25, 30, 19 and 18. He did, however, run the meanders as far as they had any connection with the mouth of the river, particularly noting the section line of the meander line south of the church. He commenced the survey at the point at the corner of Section 7, 8, 17 and 18, and tied in his work to this corner, and that he surveyed the portion delineated on exhibit 4 with reference to the physical conditions of the river, only fixing the meander line on the eastern upland boundary of the reservation from the old Indian church for some distance south to see what relation it had to the actual location of the river on the ground. He made such notes and referred to existing surveys in so far as he thought the same was necessary to a determination of the true position of the river channel. He did not attempt to [55] bind himself arbitrarily by the Snow Survey. He admitted that he was required under the assignment to this survey work on the Lummi Indian Reservation to report to the United States Attorney at Seattle, and to go on the ground that to do work as such attorney might desire for the purpose of obtaining evidence in the present case.

When asked to indicate wherein the instructions

(Testimony of Capt. George R. Campbell.)

appears the initial point of the survey made in pursuance of the field-notes, he said that he did not believe the initial point was indicated except in a general way, the same beginning at the mouth of the Lummi River.

When asked if there was any stake set at the mouth of the Nooksack River, he answered: "Well, the Government corner. Here is the Government corner on the west side of the river. The old channel. We tied to that corner and fixed it as the corner of townships 38 and 39 range 1 and 2 east W. M." He admitted that his field-notes and special instructions which he had received cover all of the north boundary and a portion only of the east boundary of the reservation. He testified that he had never been on the ground before his visit here.

At this point defendant identified exhibits "A," "B," "C" and "D," but upon objection of counsel for the Government they were rejected.

Upon redirect examination witness stated that he was asked by the United States Attorney to procure all the data possible for the purposes of making his map (Plaintiff's Exhibit 4); that he referred to the Smith and Hurd Survey, Campbell Survey, Hedges Donation Survey, together with the field-notes on the same, all for the purpose of gathering additional data, and doing the work which was done in making up the [56] map (Plaintiff's Exhibit 4). He testified that the photograph (Plaintiff's Exhibit 5) was an actual picture of the land in question, and placed the approximate position of the piling on the photograph in ink opposite the church, writing the

(Testimony of Capt. George R. Campbell.)

word "church" on the margin of the photograph. He was asked whether hydrographic surveys were in his opinion accurate, and he replied that such a survey would fix the mouth of a [57] river with greater accuracy than any other kind of survey; that it was practically the only way the mouth of the river could be fixed from an engineer's standpoint.

On recross-examination he was asked whether hydrographic surveys are accompanied by any recorded set of field-notes. He stated that when hydrographic surveys are made, notes are taken of the bearings, courses and distances of permanent landmarks and shore points, and that this information is filed in Washington, D. C. Information of an identical character is put on the plats. The instrumental work in these surveys is very accurate. All features connecting the shores with the waters are accurately outlined and surveyed in and tide to permanent landmarks, and that these surveys are made with extreme accuracy, because they all worked on astronomical basis; that they had taped and chained a number of times.

The witness denied that because the meander lines were not arbitrarily fixed at the time the hydrographic maps were made, that they could not in any sense be accurate maps, but simply reconnaissances. He further stated that a reconnaissance was a preliminary rough survey for the purpose of getting information. He testified that the engineering department at Washington, however, does not use the term "Reconnaissance" as it is generally used

(Testimony of Capt. George R. Campbell.)

in engineering work. He states that they are accustomed to arbitrarily designate their hydrographic sheets as reconnaissance [58] maps or surveys, but that in his judgment the Government does not publish hydrographic sheets or maps when their information and survey work on the same is not accurate. He stated in other words that the hydrographic reconnaissance sheet is much more accurate than the use of the term in a general engineering sense would indicate. He was asked whether or not the same accuracy would be used in making a hydrographic survey where the upland had not been surveyed. Witness was of the opinion that such work would be very accurate because the Government is always careful to do as accurate work as is possible on the coast line and in its marine coast survey work. In this connection, he further stated that in the ordinary survey they do not pay much attention to the accuracy of ordinary meander lines, and that the meanders established in the early surveys were more or less carelessly run, and do not show the section line with any particular accuracy. Sometimes they are cited and at other times they run ahead and estimate the course, but that when the hydrographic surveys are made, an astronomical base line is laid along the shore, and any sinuosity of the shore were either offset or train with reference to the base line. Witness testified that he had made a great number of hydrographic surveys, and that he is on the qualified list of Government hydrographers.

Taking the testimony as a whole with reference to the difference between upland and hydrographic sur-

(Testimony of Capt. George R. Campbell.)

veys, the witness said, "I don't believe there is any [59] survey that is more accurate."

Witness testified that he had looked over the hydrographic sheets in Plaintiff's Exhibit 1 to 3, and that they seemed to correspond with the present topography except where the changes have taken place as indicated on the map he made (Plaintiff's Exhibit 4). He testified that he did a great deal of work on the land shown in the photograph and on the map made by him (Plaintiff's Exhibits 4 and 5) by triangulation on the ground, using steel tape and flags rather than to measure from any of the fixed Government corners established by previous upland surveys.

Testimony of D. H. Evans, for the Government.

D. H. EVANS, a photographer, was next called as a witness for plaintiff, who testified [60] that he had been employed as a teacher on the Lummi Indian Reservation for about eight years, commencing in September, 1891; that he was entirely familiar with the physical condition of the land at the mouth of the river, his knowledge of the same beginning in the year 1891. He testified that he is a photographer, and made Plaintiff's Exhibit 5, which is an accurate picture of the land appearing to one's view from the belfry of the Catholic Church, which is referred to by a little square on the margin of the photograph (Plaintiff's Exhibit 5). Witness remembers very clearly the line of piling and the cottonwood trees, that the piling was there when he arrived, and that the water was running to the sea in the front of the church. He refers in his testimony to the 1888-1908

(Testimony of D. H. Evans.)

river before the course of the Nooksack was diverted at the point up in Section 8, and commenced to flow south to the sea in its present course, commonly known as the Zane River. He testified further that when he went to the Reservation in 1891, that there was a channel and river on the line marked on exhibit 4 as the old river 1855-1888, namely the channel flowing from the cedar stump and the cottonwood trees easterly parallel with the Hedges Donation Claim over to McDonough's wharf, and thence south to the sea in the bed of what is now the Zane River. He testified that he went up this channel many times; that there was a little dry slough with some water in it in that portion of the [61] Zane River lying north of the old river channel. It was through this dry channel that the Zane River waters were diverted in 1888 at the point of diversion or overflow in Section 8. The Zane River broke through at the point marked "County Ferry." This slough was nearly dry in the summer-time. It had a small bridge over it on the road which lead over to the main river.

Witness testified that he knew Mr. McDonough, the proprietor of McDonough's wharf, Hillare Crockett in their lifetime; that these persons were very old when they died, and that they had said to him many times that the mouth of the river was at McDonough's below his wharf. This would be in the same direction as Treaty Rock. Witness wrote the words "cottonwood" on his photograph, which was offered as exhibit 5.

Testimony of F. G. Betts, for the Government.

Government's next witness was Mr. F. G. BETTS, who testified that he had been employed as United States Government Surveyor for eight years; that he had acted as assistant to Capt. Campbell, the surveyor in charge of the work, and the one who planned and did the survey work described in and who drew the map known as Plaintiff's Exhibit 4, Mr. Campbell and he acting together. He testified that the confluence of the two rivers was at the cedar stump at the line of piling shown on the map Plaintiff's Exhibit 4. This exhibit 4 shows the course of the old river marked as 1855-1888. With reference to this old river, to wit, 1855-1888, [62] he traced the course of the channel as well as the river bank line. He found the marks of the old channel along its course. This line of channel was indicated by logs, roots and snags which had come down and lodged there. He found some logs eight feet in diameter lodged along the bank of the old channel. He examined the land of the Reservation opposite McDonough's wharf, and testified that at a point opposite the wharf extending out to the edge of the bay, the land is composed of mud and sand flats, the low-tide mark being delineated in exhibit 4. He stated that the high tide reaches the line of Section 8, and in some places goes into Section 8; that some of the high tides which he observed went to Section 9 between Section 8 and 17. He was on the ground between the 21st and 29th of June; that at high tide the land is all covered except what is shown by vegetation in the photo-

(Testimony of F. G. Betts.)

graph. He testified that he went out as far as Treaty Rock, and that the same is delineated on exhibit 4 with accuracy. He was asked whether he would say that the river had a well-defined bank opposite McDonough's wharf. He said he would rather call it a shore line, but that it had a well defined channel. This was because the land was so low and flat. The land in Section 17 on the southwest side of the Lummi channel in its present course is marsh land, which overflows at high tide.

In conclusion, he testified that exhibit [63] 4 contains an accurate portrayal of the physical conditions of the premises from the situation of the land marks and points referred to therein.

Testimony of Peter James, for the Government.

The next witness on behalf of the Government was PETER JAMES, who testified that he was an Indian who married a Lummi woman in 1888. Prior to his marriage he went up to visit his future wife at her father's place on the reservation in 1886. This was his first trip to the reservation. He testified that he went to McDonough's store, and received instructions from some one, continued on across the dry slough, and over past Clark's place to the cottonwood trees; that he was ferried across the main river at the point of the cottonwood trees at the Reservation side, where he found his friends awaiting him; that at this time the slough above McDonough's which runs in the direction of the present Zane River was nothing but a slough. He remained on the reservation for three days at this time; that in

(Testimony of Peter James.)

returning he took a row-boat with his father-in-law and went from the point marked "Old Indian Houses" on exhibit 4, along the course as indicated by the 1855 to 1888 old river, out to the present Zane River, and thence southward past McDonough's and Treaty Rock to Bellingham Bay. In 1888 witness married his wife in Seattle, and left for [64] Bellingham in a canoe, arriving at the mouth of the river, went past Treaty Rock, past McDonough's to the Indian village referred to on the exhibit as "Old Indian Houses." He testified that this was the only river at that time, and that there was no other river channel to enter the Nooksack. He remained there a year, then went to Fairhaven, and returned to the reservation, and has lived there ever since. He placed the mouth of the Nooksack River in the years 1888 and 1889 as out in front of Allen's place, and witness wrote in the word "Allens" on exhibit 4, the word "Allens" being a little below Treaty Rock. In 1889 witness states that the river started to cut the bank at sharp right-angles, turned in front of the church and finally broke through and started to flow in a southerly direction out past Fish Point, Bellingham Bay. That even in 1890, at the time the river broke through following its south channel to Fish Point, the 1855-1888 old channel running easterly in a parallel direction with the Hedges Donation Claim, was still used for traffic purposes on the river; that there was plenty of water at that time, but that it gradually dried up. As the new channel commenced to grow larger and deeper,

(Testimony of Peter James.)

the drift logs and snags helped fill up the old channel, and the white men let it stay blocked up in order to use the 1889–1908 river for logging purposes. It gradually filled up until it reached its present condition, which is practically that of a swampy slough. He testified [65] that he traced the course of this old river channel on the ground in company with the United States Attorney trying the case, Mr. Evans, Capt. Campbell, Mr. Betts and others. He stated that there is physical evidence to this day showing the banks of the old river whose course he followed in coming up to the Indian village when he first went on the reservation in 1886. This old river is accurately portrayed on Plaintiff's Exhibit 4. He was asked concerning the Zane River or new river, and said that it started to cut through at the point referred to by Campbell in Section 8, about the year 1902. This Zane River has its point of intersection with the old 1855–1888 river channel just south of the section line of Section 8 in Section 17. He testified that there is a shack there, and that this shack was pointed out to counsel for the Government and the engineers as the shack of Lucien Gillis; that in 1902 there was a jam formed in the Zane River at about the point where it subsequently broke through. The water kept cutting and cutting until the jam finally gave way, and went tearing through the land along the course of the dry slough, which left the old river course, and ran northerly past McDonough's wharf. The water cut down this slough course, and gradually washed away the channel, so that the en-

(Testimony of Peter James.)

tire Nooksack River had changed its course by the year 1908. Witness stated that he believed somebody broke the jam by dynamite, which was used to open up the log jam obstructions. [66]

From the intersection between the old and new river at a point just below the line of Section 8 in Section 17, the Zane River follows the old river course out past McDonough's to the sea. He was asked as to the banks of the old river, and replied that there were no trees or high banks, but had a real sand or mud bank at a point opposite McDonough's wharf, which would be three or four feet high; that the ordinary tide flowing up the river did not cover the ground in front of McDonough's wharf, because the river banks were much higher than they are now, and that Treaty Rock was exposed in ordinary low tide, as was the land out in front of Allen's. Witness got acquainted with a number of old men who lived on the reservation, and were familiar with the location of the river.

Q. With reference now to McDonough's and Treaty Rock, how far at that time was the land exposed in ordinary low tide?

A. Why, it was exposed right in front,—as I stated before,—in front of Allen's on an ordinary tide.

Q. Did you have occasion at any time in years gone by to talk with old men who have since died, concerning the mouth of the Nooksack River,—its location?

A. Why, yes. Why, Mr. Crockett used to often talk about it, because that channel there and that river has always never been,—always questioned.

(Testimony of Peter James.)

Been some dispute in regard to the way the channel on account of the cutting of the new channel, and we always discussed the point. That channel was the first channel that I come up in 1888, and they all seemed to know that that was the only channel.

Q. Was there some discussion among some of these old people,—people now dead,—as to the mouth of the river, as to where it was located? [67]

A. Yes. They were always debating in regard to that river, because there is a good many people has claimed that that new channel that was cut through the reservation was the original river always been a river, and they were disputing.

Q. Where did these old people place the mouth of the river in your memory?

A. The people would always place it there about where you call the rock.

Q. Treaty Rock?

A. Treaty Rock, as they call it. That was after 1888. They have not been talking about it so much after 1890 and 1892.

Q. Was there now any river or any mouth or outlet carrying any substantial amount of water between the present river and the river running south of the church that was closed by the log jam in 1908?

A. Yes, there was a little slough there, but that is the slough between that and there (indicating) next to Harry Price, to the east of Harry. There was a slough there. That middle slough,—that is the slough that carried quite a bit of water during the cutting of the river.

(Testimony of Peter James.)

Q. Was that ever regarded by you or by the settlers as one of the mouths of the river?

A. No, no, that was perfectly dry.

Q. Will you look carefully at that map, at the points designated on the map as the cottonwood trees and the Indian houses and church,—in other words examine the map carefully and state whether in your judgment within your recollection the things pointed out there and marked out on that map are correctly represented?

A. Yes, sir. Yes, sir. This map here, it shows exactly just the way that river was in 1886 and 1888 and on—

Q. And you are now referring to plaintiff's exhibit 4? A. Yes, sir. [68]

There was much talk about the course of the river, because of the frequent changes made by the various causes developed in this case.

Witness testified that there was always a little slough in that portion of the river designated as the 1889-1908 river, and that there was what was called the middle slough which carried quite a sheet of water about the time the river [69] cuts its way through at the line of piling. Witness was asked to examine Plaintiff's Exhibit 4, and stated that the cottonwood trees, Indian houses, church and river were delineated thereon to the best of his knowledge. Witness testified that the mouth of the river through which he passed in going from the old Indian Houses and his father-in-law's place to McDonough's was sometimes called "Steamboat Slough." The witness was born in 1869.

Testimony of William McCloskey, for the Government.

Government's next witness was WILLIAM McCLOSKEY, who testified that he was a Lummi Indian born in 1861, and at the time of trial was designated as a Government employee known as "Farmer in Charge." Witness stated that he had lived continuously on the Lummi Indian Reservation since 1900; that he left the Lummi Reservation in 1872, and attended the Indian School at Tulalip. Witness refers to the time when as a boy of eleven years of age he recalled the mouth of the old river as delineated on exhibit 4. Witness stated that in company with Mr. Evans, Dr. Buchanan, Capt. Campbell and counsel for the Government he went over the ground and found physical evidence of the old channel which follows the course from the cedar stump to McDonough's wharf. He found evidence on the ground of well defined banks of the old river channel; that he observed stumps and heavy logs in the course of the channel. He testified that in company with the engineers they were able to [70] trace the line of the old river from the cedar stump to the little shack of Lucien Gillis at the intersection of this old channel with the Zane River, and that the present river flows along the course of the old river from the point opposite McDonough's wharf to the sea. Witness was asked where to the best of his recollection the mouth of the old river was when he was a boy of eleven years, and he replied that it was as near as he could recall at a point

(Testimony of William McCloskey.)

opposite or in front of Allens at ordinary tide; that the line of low tide and the mouth of the river would be at a point a little south of Treaty Rock. Witness states that he is familiar with the tide line at the mouth of the Nooksack, and that in his judgment the line showing the line of low tide on Plaintiff's Exhibit 4 is accurate to the best of his judgment.

Witness visited the reservation in 1889 and found that the river had commenced to flow south past the church. Witness testified that prior to 1888 the 1855-1888 channel was much used for traffic and by people traveling up and down the same in canoes. Witness was asked concerning the small or middle slough, and stated that in high tide he could go up to the main river through the dry slough midway between the present river and the river formed in 1890, known as the 1888-1908 river.

In regard to this so-called middle slough witness testified: [71]

“Q. How about this dry slough midway between the present new river and the river formed in 1890 and continuing until 1908?

A. It was just a small slought in high tide you could go up through it and get in the main river.

Q. Get into the main river at high tide?

A. Yes.

Q. Was it available at all at low tide?

A. No, sir.”

Mr. McCloskey knew a great many old men, now dead, who in their lifetime made statements con-

(Testimony of William McCloskey.)

cerning the location of the mouth of the Nooksack. Among these were Mr. McDonough, proprietor of the store and wharf, and also Hillare Crockett. Witness stated that McDonough upon one occasion standing in front of his door, facing south pointed out toward Treaty Rock as the place where the mouth of the river was when the reservation was created. He also pointed out to him the course of the old river.

Testimony of Thomas Jefferson, for the Government.

The next witness for the Government was THOMAS JEFFERSON, who testified that he was sixty-three years of age, whose mother was Queen Victoria of the Lummi tribe. This witness had resided continuously on the Lummi Indian Reservation from 1874 to the date of the trial. Witness stated that he was with Dr. Buchanan, counsel for the Government, the engineer, Capt. Campbell, and others, during an inspection trip across the reservation. He remembered the cedar stump, cottonwood trees and line of piling, and states that they are accurately set forth on the [72] exhibit. He was with Mr. Evans when the picture (Plaintiff's Exhibit 5) was taken from the church steeple. Asked as to whether he walked over the course of the old channel from the cedar stump out to its point of intersection with the Zane River, he replied in the affirmative, stating that he observed big logs, stumps and heavy timbers along the line of channel. These were drift logs which were carried down the

(Testimony of Thomas Jefferson.)

river and deposited along the course of the old channel which is now a mere depression in a swamp. Witness observed the course of the old channel on the ground, and stated that there was some physical evidence of the old banks of the 1855-1888 river from the cedar stump to the intersection with the present Zane River, and that the court was the same as delineated on the map in his judgment located the same with accuracy. Referring to that portion of the old river which is now contained in the new river from the point of intersection below the south line of Section 8, and somewheres near McDonough's wharf down to Treaty Rock, witness states that the appearance has changed somewhat, but that it is substantially as it was in the old days. The new channel has changed "a little bit." He stated that the river when he first saw it in 1874 in the portion referred to flows in substantially the same course now as it did then, and that its mouth was at Allen's place. He was asked whether he referred to the word "Allens" written in ink on Capt. Campbell's plat, exhibit 4, and he replied that it was. This point is about opposite [73] Treaty Rock. When witness went to the reservation, Mr. McDonough was then on the reservation having the store somewheres near the present church and place marked "Old Indian House." Witness remembers that some time after he went to the reservation, McDonough moved over to his place on Marietta side, which is approximately where McDonough's wharf is located as delineated on Plaintiff's Exhibit 4. Referring to

(Testimony of Thomas Jefferson.)

the old channel opposite McDonough's wharf, witness stated that there was a well defined bank opposite the wharf, the bank, however, being sand or mud bank, which at high tide was exposed to a distance inland about one-third of the way between McDonough's and Treaty Rock, and that from the point one-third of the distance from Treaty Rock toward McDonough's inland, the delta or land at the river mouth was not submerged, and that the river from the line of high tide flowed along the course indicated by the delineation, 1855-1888, with well-defined banks. He testified that years ago the Indians used to have horse-races on the south side of the 1855-1888 river channel. He remembered that the Indians in going from the reservation to Bellingham crossed the river at McDonough's swimming their horses and continued on across the dry land from that point over to the reservation. He stated also that the Indian horse-races were held along the flat land enclosing the river channel. Witness remembered the middle slough, and stated that there was grass growing along the river course up to the church in a northwesterly direction. [74] Witness knew a number of ancient men in their lifetime, among others McDonough and Hillare Crockett. These men frequently told him that the river flowed along on the Marietta side of the mainland, and that it had its mouth at a point opposite Allens. He remembered a man by the name of Bolin, who was over one hundred years of age when he died; that this man's aged grandfather told him that the first Indian vil-

(Testimony of Thomas Jefferson.)

lage was located on the mainland about where Allens is now, and that the mouth of the river was there during all time within their memory.

Witness examined Plaintiff's Exhibit 4, observed the old slough, ferry, cottonwood trees, line of piling, church, Indian houses and other data contained thereon, and stated that the same was portrayed with accuracy and represented the location of these ancient landmarks and the position of the old river.

Testimony of Solomon Balch, for the Government.

The next witness for the Government was SOLOMON BALCH, who testified that he was a Lummi Indian, fifty-seven years of age, and that he came to the Lummi Reservation in 1884. He remained upon this occasion for about two weeks, and returned later in 1888, when he stayed on the reservation permanently. This witness was with the party which walked over the reservation, which included Government's counsel, Capt. Campbell, Dr. Balch, Mr. Evans and the other witnesses. Witness was there when the photograph (Plaintiff's Exhibit 5) was taken, and stated that the same presents a fairly accurate picture of the [75] land at the mouth of the river in front of the church. Witness saw the line of piling and the cedar stump, and testified that they are accurately delineated on exhibit 4, in his judgment. He was asked whether the line of the old river channel shown on exhibit 4 as old river 1855-1888 within the dotted lines represented the course of the old river as he remembered it. He

(Testimony of Solomon Balch.)

replied in the affirmative, stating that when he came up from Bellingham on the first trip, he followed a course up what is now marked "Old Channel, 1855-1888." He made this trip in an Indian canoe from Bellingham, landing at the old Indian village just north of where the church now stands. Mr. Balch also stated that there was a little rope ferry operated by hand across the small slough, which leads up from the old river a little above McDonough's present wharf, and which is now approximately in the position of the new river. He stated that McDonough in 1884 had his store at the place fixed on exhibit 4 as McDonough's wharf, and having his attention called to Allen's place on exhibit 4, and also McDonough's wharf, fixed the mouth of the Nooksack at that time as being opposite Allens, pointing at the time to *to* Treaty Rock as shown on exhibit 4 of the plaintiff, the map made by Capt. Campbell. Asked as to the banks of the old river opposite McDonough's, witness remembered that the river had a well-defined bank; that the Indians used to swim their horses across the river [76] at McDonough's, and go up to the reservation on the west or south side of the river across the land. Witness further testified that the old river broke through at the point on exhibit 4 shown by the line of piling and the cedar stump, and commenced to flow down past the church on the south course toward Fish Point. This is indicated by the 1888-1908 River. Witness remembered when the piles were driven, and that he furnished some of the

(Testimony of Solomon Balch.)

piling and hired one of the men to help drive the piles to stop the action of the river on this southward course. Witness explained the matter of hiring the man to drive the piles by saying that the Indians all joined in to hire a white man and paid for his services. The efforts of the white men in blocking the river would have been successful but for the action of some other white men in a snag boat, which, as he remembered was called the "Skagit Chief," that came up the river and pulled these piling out, and the water was thus enabled to break through and take the course which is shown by the 1888-1908 river. He further stated that the new river was formed by some white men opening up the log jam up in Section 8, which caused it to flow along the course indicated by the 1908 river, sometimes called the Zane River.

This witness knew a number of old men, now dead, who said that the mouth of the old river was out at Treaty Rock opposite Allens, and that the channel flowed along the course indicated by the old river channel from the cedar stump along the Hedges Donation Claim to McDonough's, and thence south in a [77] direction which now conforms to that of the new river. Witness was shown Plaintiff's Exhibit 4, and stated that the ancient landmarks and other data thereon are accurately portrayed and set forth and give a true picture of the same.

Testimony of A. R. Campbell, for the Government.

A. R. CAMPBELL was next called for the plaintiff and testified as to the accuracy of the Campbell surveys of 1905. He testified that he was employed by the United States to survey portions of the Lummi Indian Reservation in the year 1905, and made a plat and survey of it. He was shown Plaintiff's Exhibits 7 and 8, two maps made by him at that time, for identification, and was asked what they were. He replied that they were identical except that one contained details and data written upon it that the other did not. He selected Plaintiff's Exhibit 7 as containing detailed information. Government counsel then withdrew Plaintiff's Exhibit 8.

He was asked, referring to the map (Plaintiff's Exhibit 7) as to whether he had designated what appears to be the old channel of the river on his exhibit prior to that survey. He replied that he had, and that it appeared on his plat or map. While he did not look for the mouth of the old river, he did find the channels indicated on his map and so platted them. He did not attempt to give the direction except as shown on his map. At this time the main river flowed past the church in a southerly direction to Fish Point and Bellingham Bay, which is also designated [78] on his map. Mr. Campbell's survey of 1905 was then admitted in evidence. (Plaintiff's Exhibit 7.)

Witness stated that he used field-notes sent to him from the department, but did not know whether

(Testimony of A. R. Campbell.)

these field-notes were made by Snow as part of the Snow survey, or not. The field-notes had no data on them, but that he found all the marks and corners and re-established them from those notes. This witness established the west line of Section 18 and the lines extending east from that line to the river as it was then located. The witness put in the lines according to the notes, and found that the meander corner of the section line of 18 that the river was nearly four hundred feet further east. Witness stated that his survey instructions contained no mention of any easterly boundary, but he was required to survey that portion of the reservation lying east of the main channel of the Nooksack River as it existed at that time and south of the old channel. He also had a map with instruction showing the approximate situation of the lands he was required to survey. From the data contained in the old field-notes of the Hedges Donation Claim, witness determined what he believed to be the original channel of the Nooksack River. Witness had his attention called to the meander line in Section 18, and was asked whether it was not on the bank of the main channel of the Nooksack River as it existed at that time. He replied that the river was four hundred feet from the meander line, or that the line was four hundred feet west of the then main bank of the river. [79]

During A. R. Campbell's testimony, defendants sought to introduce a number of their own exhibits upon the identification of the same by the witnesses.

(Testimony of A. R. Campbell.)

The Court sustained objections to these several offers, and later on during the presentation of defendants' case, they were admitted.

Testimony of George Tsilano, for the Government.

GEORGE TSILANO was next called by plaintiff. Testifying for the Government through the previous witness Peter James as an interpreter, he said that he spoke the Lummi Indian tongue, and understood no other language. He was in his one hundredth year when he testified at the trial. He stated that he attended the Treaty of Mulkilteo at Point Elliott when General Stevens, represented the United States in the negotiations with the allied tribes on Puget Sound. He was then a married man with one child; during this treaty and the negotiations which were held; the witness testified that he remembered when Governor Stevens, talking through an interpreter, told the Indians the ground that would be given to them, and in Indian language they were told that their reservation line would run from Point Francis to Treaty Rock, and that this course or distance would be the eastern side of the reservation of Cha-Cho-Sen (Lummi Indian Reservation). Witness further stated that during all of the discussion attending the treaty negotiations, that it was always understood that the big rock now referred to as Treaty Rock, would be the eastern point of the reservation, and the eastern boundary line would be from Point Francis to Treaty Rock. He further testified [80] that the

(Testimony of George Tsilano.)

rock delineated on exhibit 4 is in existence, and that it is the particular rock then referred to as Treaty Rock, and that it has always been there within the memory of man.

Witness knew where Allen's place was at Marietta, remembered his house and the further fact that the old Indians used to live in that vicinity during the very early days. He testified that Treaty Rock is a little beyond Allens going south. This witness remembered very accurately the location of the mouth of the Nooksack River in 1855, and testified that it was just a little bit above the rock at the time of the treaty, the point opposite Allens. The river flowed at that time down past the point now referred to as McDonough's wharf on its course south. He was asked particularly whether he remembered the location of the mouth of the Nooksack River when the reservation was established in 1872, with particular reference to Treaty Rock and McDonough's store or wharf, or the place where McDonough's wharf now is. He replied that at that time the mouth of the river was just about there at Treaty Rock, because he and a Mr. Bunkbonar, an Indian agent, frequently used this river in going to and from Bellingham. This witness stated that it was dry land on the opposite side of the river across from McDonough's store over to the Indian village, and across where the Indian church now is; that there was a well-defined bank and the land was well out of water on the south bank of the river. The high tides at that

(Testimony of George Tsilano.)

time used to come [81] as far as McDonough's wharf, and the river at that time was quite deep, and there was plenty of land on the other side of the river opposite McDonough's store. He further testified that there was always a big body of land lying south and west of the old river, which was also exposed at high tide, and that the land extended on the west and south side of the old river to a distance about equal to that between McDonough's store and the present ferry. He subsequently qualified it by saying that it was a little less in distance. In other words, the line of salt water extended this distance southwest on the other side of the river in front of McDonough's store.

Testimony of Henry Kavina, for the Government.

HENRY KAVINA, the next witness testifying through the previous witness Peter James as an interpreter, for the Government, stated that he was born on the Lummi Indian Reservation, had lived there all his life, and that he was about seventy-seven or seventy-eight years of age; that he was present at the Treaty of Point Elliott; that he was a boy then about thirteen or fifteen years of age, and he remembered that during the treaty negotiations, much was said about the boundary lines of Cho-Chu-San; that his father was one of the chiefs who participated in the treaty making, and that Treaty Rock was supposed to be the eastern boundary of the Indian Reservation; that the easterly boundary line ran from Treaty Rock down to Point

(Testimony of Henry Kavina.)

Francis. He remembered that the mouth of the river was at or near Treaty Rock opposite Allens. This witness was one of those who helped to build McDonough's wharf; and that there was dry land opposite [82] McDonough's store which had a well-recognized bank; that boats used to commonly come up the river to McDonough's and that the water was very deep. Asked as to how much dry land there was on the other side of the river opposite McDonough's and its distance out to the bay, he said that there was always land exposed even on extreme high tide; that there was a large body of land on the other side of the river always to be seen at ordinary high tide; that this land had grass of different sorts on it; that the land was dry and extending from a point opposite McDonough's across the river up as far as the place where the church now is, and that the main river ran from the cedar stumps, cottonwood trees easterly to McDonough's, and then south along the course indicated by the dotted line, old river channel 1855-1888. This was the principal river during the period within the witness' memory from the time he went to the reservation until its course was changed in the years 1888-1890.

**Testimony of Albert Descanum, for the
Government.**

ALBERT DESCANUM, next witness, testifying through the previous witness Peter James as an interpreter, for the Government, testified that he was

(Testimony of Albert Descanum.)

born on the Nooksack Reservation; that he was nearly eighty years of age at the time of the trial, and that he had spent his life on the lands in and around the mouth of the Nooksack. He remembers very well when the reservation was set aside by the President, and has always known the rock referred to as Treaty Rock, and was familiar with the location of McDonough's wharf and store. [83] With reference to these two points, this witness placed the mouth of the river as being in between McDonough's wharf and the rock; that there was dry land at high tide on the other side of the river opposite McDonough's; that it had a well-recognized bank. He further stated that there was dry land all the way from the point opposite McDonough's up to the church; that when he was a young boy he used to run all over this land. That there was grass growing on this land, and was always exposed at high tide. Witness knows the distance between McDonough's store and the present ferry, and fixes it about a quarter of a mile, in his judgment. When asked if the land south of the river bank out toward the line of salt water was as wide as the distance between McDonough's store and the present ferry, he replied that it would be a little better than this distance; that there would be that much land always exposed at high tide.

This witness knew Henry Kavina's father, the chief, and remembers this old chief and a number of other old men who were at the Mulkilteo treaty and stated that these old men, now dead, all said

(Testimony of Albert Descanum.)

that the easterly line of the reservation was from Point Francis out to Treaty Rock on a line drawn between the two points. He replied further that the Nooksack had no other mouth, and no other channel within his memory, except that outlined by the old river with dotted lines, 1855-1888 (on Plaintiff's Exhibit 4).

He remembered also the line of piling at the point opposite the church, and states that the river changed its course at the time these piles were pulled out. Asked by the Court as to where he would [84] place the mouth of the river in 1863, he replied that he could give no other mouth of the Nooksack but that given by his statement, that it was down at Treaty Rock. He was asked also by the Court where the mouth of the river was in 1890, and he replied that its mouth after the change of course in 1890, would be about at Fish Point, which is below the church in a southerly direction.

Testimony of George Warbes, for the Government.

GEORGE WARBES was next called as a witness for plaintiff. He testified, through the previous witness Peter James as interpreter, that he was seventy-seven years of age; that he was at the treaty of Mulkiteo as a small boy. He remembered that the old people at that time talked about the boundary line of the reservation and where it would be. He remembered that he afterwards heard these old people observing Henry Kavina's father, the chief, and some of the old head men of the tribe

(Testimony of George Warbes.)

speak about the eastern boundary of Cho-Chu-San. All of these people, now dead, said that the big rock is where the line would be on the easterly side of the reservation. Asked as to where the mouth of the river was in 1872, this witness stated that to the best of his recollection it was at or about Treaty Rock. This witness knew where McDonough's store was, and stated that there was dry land opposite McDonough's wharf when the President made the reservation in 1872. There was a big body of land on the other side of the river a good deal higher than it is now, and that it extended farther [85] out. He was asked if he knew the distance between McDonough's store and present ferry. Replying that he did, he stated that the land extended from a point opposite McDonough's out to salt water a little farther than the distance mentioned, namely, the distance between McDonough's and the present ferry. This was on dry land, and you could walk from a point on the other side of McDonough's up where the church now is.

Testimony of George Bremner, for the Government.

GEORGE BREMNER, called by plaintiff, testified that he was born in the State of Iowa, and came to Lummi Indian Reservation on June 4, 1880. He had occasion to visit the reservation while en route from Bremerton to Lynden on the Nooksack River some distance from its mouth. He went to his destination in a canoe. This witness knew where Treaty Rock was, and also the location of Mc-

(Testimony of George Bremner.)

Donough's wharf and store. Referring to these two points, he placed the mouth of the Nooksack in 1880 as being a little distance above Treaty Rock, using the language: "Not far from the rock, Treaty Rock."

Asked as to what point the mouth extended the line between Treaty Rock and McDonough's wharf, he said it would not be farther than half the distance. This witness also stated that there was dry land opposite McDonough's store on the other side of the river. This land was level, flat land higher than the plane of the river, and that it was covered with grass and vegetation. [86]

Witness was shown the map made by Capt. Campbell (Plaintiff's Exhibit 4) with the old channel 1855-1888 marked thereon. This map with its ancient landmarks and other data fairly and accurately portrayed the location of the river at that time, he said.

Witness, according to the best of his recollection, stated that there was at least half of land south and west of the old river before you came to the line of high tide. Witness came again to the reservation in 1893, and found that the river was then flowing south to the sea past Fish Point. Witness went to the Lummi Indian Reservation to teach in the year 1908, and is familiar with the physical condition of the reservation lands. He knew Henry Kavina's father, the old chief, Hillare Crockett, and many other old men, now dead, who lived on the reservation. This witness had talked with these ancient

(Testimony of George Bremner.)

persons many times, and had always heard them refer to the mouth of the Nooksack River when the reservation was established as located at Treaty Rock. These witnesses also had attended the treaty of Mulkiteo in 1855, and all of them stated that it was the understanding through the treaty negotiations that the easterly line of the reservation was to extend from Point Francis out to Treaty Rock.

At the close of the plaintiff's case, the Government checked up its exhibits offered or rejected [87] during the presentation of its case. Plaintiff first offered exhibit 1 upon which the Court had previously reserved ruling. Defendant objected on the ground contended for generally throughout the case, that the Snow Survey of 1874 definitely established the boundary lines to the reservation, and the Presidential Proclamation had no legal force as such to fix the boundaries; that the same was only advisory in character, and depended upon subsequent survey for its actual boundary lines. The particular objection was that the maps were hydrographic ones delineating the shore line and bay way outside the meander lines of the Snow Survey, and therefore of no legal effect. The Court overruled this objection, and admitted this exhibit and also the following exhibits in the order named:

Exhibit No. 1, Recognizance map of Bellingham Bay in 1856.

Exhibit No. 2, Hydrographic map of 1887, showing Rosario Strait, referred to as Sheet No. 9.

Exhibit No. 3, United States Geological Survey called Blaine Quadrangle.

Exhibit No. 4, Map showing lands at mouth of Nooksack River had been previously admitted so far as it portrays the condition of *of* the lands, but not as to the conclusions placed thereon in the designations "1855 to 1888 channel" and "Nooksack River 1855 and present channel."

Exhibit No. 5, Photograph of the land at the mouth of the Nooksack River taken from the belfry of the Indian Church.

Exhibit No. 6, United States Coast and Geodetic Survey map of Bellingham Bay published by [88] Hydrographic office.

Exhibit No. 7, A. R. Campbell survey of 1905.

Exhibit No. 8 was withdrawn.

Exhibit No. 9 was the old treaty of 1855 between the white people and the allied Indian tribes of Puget Sound.

All of these exhibits were admitted over the objections raised by the defendants hereinabove mentioned, namely, J. W. Romaine and Martha B. Romaine, his wife, Fred J. Wood and Anna Wood, his wife, Robert Shields and Augusta J. Shields, his wife; Georgia Zane Bull, A. J. Zane and Clara B. Zane, Ellen Clark, Phillip Clark and Katherine Mayhew. [89]

Defendants made their opening statement, in which they contended, as above mentioned, that the official survey by Snow in 1874, followed by a later

(Testimony of Joseph M. Snow.)

one in which the allotments on the reservation were put in, the same amounting to a resurvey, established authoritatively the boundary lines of the reservation, and that these surveys arbitrarily carried out the general purpose of the Presidential Proclamation; that inasmuch as the lands in question lay outside of these arbitrary upland meanders, and the defendants procuring their title to these lands from the State, that the same was not open to attack at this time. It was thereupon stipulated that the Nooksack River is a navigable stream.

J. W. Romaine and wife, Fred J. Wood and wife, Robert Shields and wife, George Zane Bull, A. J. Zane, Clara B. Zane, Ellen Clark, Philip Clark and Katherine Mayhew, defendants, then proceeded to call a number of witness in their behalf.

Testimony of Joseph M. Snow, for Defendants.

Their first witness, Mr. JOSEPH M. SNOW, was the man who made the original Snow Survey of 1873-74, and later did the resurvey work, put in the allotment lines and reset some of the corners in approximately the position of the original survey. Mr. Snow having fully qualified as an engineer, testified that he made the survey of the Lummi Indian Reservation in 1873. Defendant, after Mr. Snow had identified them, offered copy of contract and bond, together with his instructions accompanying the same for the survey of the exterior boundaries of the Lummi Indian Reservation, as exhibit "F"; also map accompanying instructions as exhibit "G."

(Testimony of John M. Snow.)

Counsel for the Government objected to the admission of these exhibits on the ground that [90] they were incompetent, irrelevant and immaterial, and for the further reason that the Nooksack River was not depicted or delineated upon the Snow Survey, nor was the mouth of the river or the line of low-water mark specified, and further that it did not appear that the surveyor was authorized to survey the river at the line of low-water mark, or to accurately determine its mouth, and that the surveys as made by Snow were restricted entirely to the upland portion of the Indian Reservation, and did in no wise control the physical features on the ground, or the terms of the treaty or Proclamation. The Court admitted these exhibits, to which the plaintiff by its counsel duly excepted.

The witness then testifies as follows:

Mr. ABBOTT.—Mr. Snow, how long were you engaged in making the survey of the Lummi Indian Reservation?

A. I think I was there about six weeks. I don't remember the exact time. [91]

Q. Do you remember the topography of the country there at that time, calling your attention especially to the point where the waters of the river mingle with the waters of Bellingham Bay?

A. Yes.

Q. Will you please detail to the Court that situation as it then existed?

A. The shore line of the river as shown by my survey was along the front of the Indian village, and

(Testimony of John M. Snow.)

then southerly and slightly southwesterly toward Point Francis. The mouth of the river as it existed at that time I should say was about one-eighth of a mile below the store.

Q. (The COURT.) On which side was the store located then?

A. The store was located on the west side of the river in the Indian village.

Q. Where the church is?

A. Where the church was.

Q. (Mr. ABBOTT.) Mr. Snow, I wish that you would delineate upon Defendants' Exhibit "G" the approximate location of the Lummi Indian village at that time, and the course of the Lummi River or Nooksack River, or whatever you may call it, in 1873.

A. The village,—the upper end of the village,—was at the line between sections 7 and 18. Now, here is the center of 18; north line of 18, or the line between 7 and 18, is at this point. The village extended down the river here for a short distance.

Q. This delineation indicates the Hedge Donation Claim, does it not, within those lines? [92]

A. I presume so.

The COURT.—Now, that in the record wouldn't indicate anything.

The WITNESS.—I don't know that it does.

Mr. ABBOTT.—I will make an "X" at that point.

Q. Directing your attention to the point on the eastern boundary of the map marked with an "X," I will ask you whether or not that indicates the line

(Testimony of John M. Snow.)
of the Hedge Donation Claim.

A. According to the maps on file, it does.

Q. The point indicated in Lot 1,—is that Lot 1 in section 18? A. Lot 1.

Q. Yes. —is the Indian village, is that right?

A. Yes.

Q. Now, then, please indicate the course of the river at that time with respect to the eastern boundaries of the lots platted in section 18, and southerly. Trace it with a pen.

A. Coming out of the river, following the main river channel, the course came out, as I say, about one-eighth of a mile or to a point about hitting where the cross is marked. Then the main flow was almost in a direct line to the end of Sammish Island. In other words, following a course somewhat east of south.

Q. Did you mark the meanders on the eastern side of this land shown upon your map on the line of ordinary high tide? A. Line of ordinary high tide?

A. Having in mind the line of ordinary high tide, indicate [93] by a mark of identification the point of confluence of the waters of the Nooksack River as then existing with the waters of Bellingham Bay.

A. Starting on this dotted line of the Hedge Donation Claim coming down the river a trifle below the Indian village, then bearing off toward Bellingham.

Q. Do I understand that this is tide flats intervening between the Hedge Donation Claim,—that

(Testimony of John M. Snow.)

would be the limit at ordinary high tide?

A. There was a sort of slough put through here (indicating) and a little point of brush had formed on the higher portion of the flats.

Q. But you are indicating, as I understand, to the eastward of the main channel of the river?

A. I am indicating the main channel as following down this line and the shore breaking away to the east.

(Clerk marks tracing Defendants' Exhibit "H" for identification, at counsel's request.)

Q. Mr. Snow, when were you last out to the Nooksack River? A. Last evening.

Q. Do you recall the first slough or bridge that was passed over before the ferry was reached, or did you ever know the location of McDonough's last store? A. I saw it last night for the first time.

Q. That was pointed out to you by Mr. Romaine?

A. Yes.

Q. Directing your attention to Defendant's Exhibit "H," and especially directing your attention to the red line that appears on the western side, made in accordance with the note thereon reading "The area bounded by the [94] deep red line is an Indian reservation," and also having in mind the area lying to the northward to the eastward and bounded by the meanders as shown upon Exhibit "H," whether or not in 1873 at the time that you were engaged in surveying that reservation any portion of upland existed,—in speaking of upland I mean upland as distinguished from lands that are

(Testimony of John M. Snow.)

covered by sea water at ordinary high tide,—whether or not any lands,—upland,—existed within the area bounded by this meander line over to the location of the McDonough store as indicated to you last night, and the eastern boundary of the reservation surveyed by you.

Mr. MARTIN.—One moment, please. I object on the ground that it calls for a statement concerning exhibit “H,” which has not been offered in evidence and to which we object; calls for the witness to give his opinion concerning a portion of the data delineated upon Defendants’ Exhibit “H.”

Mr. ABBOTT.—Under that objection, I will withdraw the question for the time being, and offer in evidence Defendants’ identified exhibit “H,” which I understand Mr. Martin will stipulate is an authentic copy.

Mr. MARTIN.—I will do so.

Mr. ABBOTT.—An authenticated map from the office of the United States surveyor-general of the matters thereon purported to be shown.

Mr. MARTIN.—I will agree that the map is properly authenticated, but object to the introduction.

The COURT.—Let it be filed. [95]

Mr. MARTIN.—My particular reason for objecting is that no attempt is made to show the mouth of the river, and an arbitrary survey of the upland fixing any meander line does not in any sense control the boundaries of this Indian Reservation. Note my exception.

Q. (Last question read.)

(Testimony of John M. Snow.)

A. There was what might be called a small island or accretion south of the Hedge Donation Claim.

Q. (Mr. ABBOTT.) Was that accretion south of the Hedge Donation Claim east or west of the main channel of the river in 1873? A. East of it.

Q. How large was that?

A. Well, it would be difficult for me to say now. There was a few acres in it, but I cannot say how many. I didn't have occasion to measure it. It was very small though.

Q. Was that the only upland that intervened in that area?

A. That was all the upland that was visible in crossing the bay and entering the mouth of the river.

Q. At ordinary high tide?

A. At ordinary high tide, yes.

Q. It has been stipulated that Defendant's Exhibit "F" is a copy of your contract and bond with the United States Government relative to this survey of the Lummi Indian Reservation. I will ask you whether or not, Mr. Snow, you received any map or further direction from the United States Surveyor-General as to lands you were required to survey? [96]

A. I received a map defining the boundaries.

Q. Do you know where that map is?

Mr. MARTIN.—One moment, please. I object to the reference to the contract on the ground that the contract and the matters therein contained would have no bearing upon the subsequent survey. It is

(Testimony of John M. Snow.)

merged in his survey, and his survey establishes the upland meanders.

The COURT.—Let it be filed.

Mr. MARTIN.—Note my exception, please.

Q. (Mr. ABBOTT.) I asked if you know where that map is.

Mr. MARTIN.—I make the same objection with reference to the map.

The COURT.—Let him answer.

A. I don't know where it is now; probably among my papers.

Q. (Mr. ABBOTT.) Did you survey and mark the exterior boundaries of the Lummi Indian Reservation in accordance with the map given to you at that time as part of your instructions? A. Yes.

Mr. MARTIN.—I make the same objection and move to strike the answer.

The COURT.—Objection overruled at this time.

Mr. MARTIN.—Exception. Will your Honor permit a general objection to all this testimony to save my record?

Mr. ABBOTT.—I understood at the outset that after interposing an objection to a certain line of testimony it would be unnecessary to repeat the objection.

The COURT.—I don't want counsel to go and stipulate anything that I don't know anything about. The Court doesn't allow any stipulation between counsel that the [97] Court doesn't know anything about. I want to be advised of those things.

Mr. ABBOTT.—I would like to ask whether I was

(Testimony of John M. Snow.)

right in assuming that the same rule in relation to this matter applies in the Federal court as in the state court.

The COURT.—I think the exception should be noted. I think the Court of Appeals recently so held. An exception may be noted as to these documents that have been offered, and I think you have made your objection.

Mr. ABBOTT.—Yes, they have been admitted.

The COURT.—Yes.

Q. (Mr. ABBOTT.) Mr. Snow, will you state whether the eastern boundary of the Lummi Indian Reservation as shown upon your map is delineated in accordance with the map which accompanied the instructions which you received at that time?

A. It is.

Mr. ABBOTT.—I understood that you, in the early part of this examination, admitted Mr. Snow's qualifications.

Mr. MARTIN.—Indeed, we will admit Mr. Snow's qualifications, and we will admit the authenticity of the maps and charts offered in evidence. We object to them on the ground that they do not attempt to fix the point of land in issue in this case, or the point of water and land.

Q. (Mr. ABBOTT.) Were you ever at that point covered by the work that you performed in 1873 in making this survey prior to that time, Mr. Snow?

A. Yes.

Q. When? [98]

A. 1872.

(Testimony of John M. Snow.)

Q. What was the occasion of visiting that then?

A. I had occasion to go up the river to assist in prosecuting another survey.

Q. Were the conditions at that time the same as they were when you subsequently made your survey?

A. Yes.

Q. That is, referring to the location of the mouth of the river, channels and so forth? A. Yes.

Q. How did you enter the river,—by what course?

A. We entered by the deepest channel here upon this line I have indicated, extending towards Samish Bay; went up there in a Whitehall boat.

Q. Were you up there at any time after 1873?

A. Either in 1874 or 1875, I don't remember which.

Q. For what purposes?

A. Prosecuting a survey further up the river.

Q. Were the conditions the same in 1874, or whatever date that was,— A. Yes.

Q. — as they were at the time you made your survey? A. Yes.

Q. Mr. Snow, I guess if you will step over to this map it will be more convenient. When you were out last evening did you go to the meander corner, indicated by a flag at the present time, of section 18 on the reservation side?

A. I went within about 75 feet of it.

Q. Is that the same place that you went in 1873?
[99] A. Yes.

Q. At that time,—in 1873,—was the river clear below that point except for the little accretion that you referred to on the corner of the Hedge Donation

(Testimony of John M. Snow.)

Claim? A. Entirely clear.

Q. Were there any cedar stumps lodged in the river at that time? A. No.

Q. It was open and clear of any obstruction?

A. Yes.

Q. This island that subsequently appeared below,—did it exist already at that time? A. Yes.

Q. As an accretion?

A. As an accretion south of the Hedge Donation Claim.

Q. South of the Hedge Donation Claim, but east of the main river?

A. East of the main river, yes.

Q. At that point of intersection here approximately of section 18, state whether or not that was where the Indian village was originally located.

A. That was the upper end of the Indian village.

Q. As originally located? A. Yes.

Q. Did you have occasion to stay at that point while you were making the survey?

A. Only for a few days.

Q. You stayed there for a few days?

A. Yes.

Q. Where was McDonough's store at that time?

[100]

A. It was very near the old church, and I should say about—

Q. Indicate with the pointed.

A. I should say that it was probably four hundred feet below this section line between section 7 and 18,—I cannot give the exact distance,—on the west side

(Testimony of John M. Snow.)

of the Nooksack River.

Q. I will ask you, Mr. Snow, whether at that time there was a little river emptying into Bellingham Bay as distinguished from the longer river.

A. I didn't know of any and have not learned of any. This was called the Nooksack. That was the only river that was in existence at that time.

Q. Yes.

A. On this side of the reservation.

Q. Yes. On the opposite side of the reservation emptying into the Gulf of Georgia you found what was known as the Lummi River, did you not?

A. I did, yes.

Q. I believe that you have designated on this map where the mouth of the river at that time was.

A. Yes.

Q. Is that the point (indicating)? A. Yes.

Mr. ABBOTT.—The point indicated by the witness is close to the figures 18, and is indicated "Mouth of river in 1873." That is all. [101]

On cross-examination witness stated that he only made one trip up the river in the year 1872, and did not return until the fall of 1873, when he commenced his work on the survey.

"Mr. Snow testified that his contract was to survey the exteriors and subdivide the reservation in 40-acre tracts and this he proceeded to do and was not concerned with anything below the meander line, but that the meander line on the Lummi Reservation was very carefully run."

Counsel for the Government on cross-examination

(Testimony of John M. Snow.)

asked him whether or not in 1872 when land was plentiful, the meander lines were placed with any particular accuracy with reference to the joining tide-lands or [102] flats, or with regard to the particular line of high tide or extreme high tide, and he replied that these surveys were very accurate.

In response to counsel's question, he said:

“A. Are you assuming that we did not follow our instructions?”

He was asked whether it was not a fact that the meander lines in those days were run without particular accuracy, and whether there was not a considerable discrepancy between the meanders on section corners in this early work. He replied that he had no knowledge of such condition. That he was not furnished with the field-notes of the Hedge Donation Claim. There was nothing furnished him on the east side of the Nooksack River. He was then asked the following questions:

“Q. And you were not concerned with fixing the mouth of the Nooksack River at that time, were you?”

A. No.

Q. Did you ever come in contact with this field-note: ‘Beginning at the southeast corner of the claim’—Hodges Donation Claim—the same being five chains west of quarter post on line between Sections 8 and 17, where set a post for southeast corner of claim and corner to fractional Section 8. Made mound and pits, there being no trees near. This corner is under water at high tide and is overflowed at times by the river. Thence with the meanders of

(Testimony of John M. Snow.)

the beach." Do you recall that? A. No, sir.

Q. Or again, "south $73\frac{1}{4}$ west 24.18 chains to mouth of Lummi River," in Section 18. Do you remember that? [103]

A. No, not until I read on this.

The plaintiff's counsel read the question concerning the field-notes upon which he interrogated Mr. Snow from Defendants' Exhibit "C," and then asked this question:

"Q. Let me ask you what the meaning of these dotted lines is that form a semicircle around this line that you say is the line of the main channel of the Nooksack River in 1873, namely, the line extending out to Sammish Island and Bellingham Bay. How do you account for the semicircular delineation or semicircular dotted line running out there away to the eastward of it?

A. As I had nothing to do with it, I don't know what it is on the map for.

Q. Is this not your work,—this survey?

A. This is not my work. The outline of the plat is not my work.

Q. Is the other dotted line your work?

A. No, sir.

Q. Is this little crescent or little hemisphere in Section 18 on the east line of the reservation in dotted lines,—is that your work? A. No.

Q. Can you account for that being on your survey—the survey of 1873?

A. I have no knowledge of it.

Q. The official survey of 1873?

(Testimony of John M. Snow.)

A. I have no knowledge of it whatsoever, sir.

Q. Then this so-called Snow Survey of 1873 is [104] composed of your work and the work of other surveyors? A. I don't know.

Q. Well, what is your judgment as to how those lines got on there? Isn't it the work of some other surveyor?

A. I don't know. I have no knowledge of it.

Q. As an engineer, what do those lines indicate?

A. They don't belong on a surveyor's official map.

Q. Whether they do or not, what do they indicate to an engineer?

The COURT.—That don't get us anywhere. He has already said that he don't know anything about it.

Mr. MARTIN (Counsel for the Government). May I ask him the purpose of those lines being there?

The COURT.—Answer the question.

Mr. MARTIN.—What is the purpose of those dotted lines out beyond your line—those dotted lines at the mouth of the Nooksack River,—even if you didn't place them there?

A. Put on there to indicate the mud flat lines, and the channels through the mudflats.

Q. Notwithstanding that you say that the main channel of the Nooksack River followed a line as you have indicated out to Sammish Island, your official chart containing your survey and other work shows that the line of the Nooksack River was far to the eastward,—that it bent over to the eastward as indicated by these other maps.

(Testimony of John M. Snow.)

A. I want to say that my map does not define any channels of tide-lands except as defined by my [105] meander lines.

Q. We understand that. But I say the map which is referred to as Defendants' Exhibit "G," in this case, which purports to be an authenticated copy of the Snow Survey of 1873, contains dotted lines indicating that the channel flows,—main channel of the river,—flows away to the eastward, or a point far west of the place where you place it by your indicating line?

A. I will say this, that the channel at the mouth of the river changed materially with every southeast gale. In 1873 when we made our surveys, the channel was down as I have shown it there. What it was afterward or before that, I have no knowledge.

Q. But I say, indicated on the map,—on this particular exhibit,—it does indicate to an engineer that the river ran east to the section line?

A. It might have been running there at the time the map was made,—that is, at the time those dotted lines were laid out. I don't know when they were done or who by.

Q. The fact is, I understand you to say there was a flow of water out here or out on this line that you say runs out about on a straight line to Sammish Island,—the fact is that there was at all times a well-defined channel flowing as indicated by that dotted line on this part here, well-defined channel flowing out along the land, that is, along the high upland—toward Bellingham Bay?

(Testimony of John M. Snow.)

A. I never followed that shore.

Q. You never followed it? [106]

A. For the simple reason that the water was shallow and it was my good fortune to get along there about the time the wind blew and I kept in deep water for protection to the canoes and boats."

The witness was interrogated along these lines concerning the channels delineated on his official survey. Also the map on Defendants' Exhibit "G." He stated that he had never had occasion to measure the water in the places referred to; that he did not in any sense attempt to make a hydrographic survey of the mouth of the river. He was asked this particular question:

"Q. You concerned yourself solely with the upland meanders, that is a fact, isn't it?"

He replied as follows:

"A. So far as the depth of the water was concerned I was only interested in keeping the boat in deep water."

He was asked concerning the area and specific location of the accretion land which he referred to on his direct examination, particularly as to whether it did not overreach the section line between Section 17 and 18. He replied that he had no occasion to run the lines over this land at the mouth of the river. His work was done in the fall of the year when one might expect high tides. He stated that the tides were not naturally high at the time he was there. Calling his attention to the fact that it was the fall of the year, he was asked whether he could remember

(Testimony of John M. Snow.)

specifically the condition of the tides during the time he was making the survey on the reservation. He replied that he was thoroughly acquainted with the run of the high and low tides on Puget Sound, [107] but admitted that he was relying upon his general knowledge of the tidal waters of Puget Sound, and had no recollection as to the height of the tides at the time the survey was made. He was asked if it was not true that in the fall of the year the heavy southwesterly gale had been blowing, the waters would not have been driven up into Bellingham Bay, and these tide-lands covered by a much higher tide than they normally would be in the absence of a gale. That such a condition would greatly affect the amount of land which would be disclosed to the eye, and further stated that it was physically impossible to have walked from a point opposite McDonough's wharf on dry land to the Indian village opposite the cottonwood trees.

He was asked if he was not mistaken concerning his ideas as to the direction of the main river, and whether it was not possible that he had in mind the so-called middle slough as being the one which ran in the direction of Sammish Island. He replied that such was not possible. He stated that he was very sure that after the lapse of all these years, he could say that the channel ran from the cottonwood trees past the Indian village straight out to the sea. He was asked if he had ever had occasion to recall that to his mind during the forty years that had elapsed

(Testimony of C. T. Tawes.)

since the survey was made. He replied that he had a fairly good memory. [108]

Testimony of C. T. Tawes, for Defendants.

Mr. C. T. TAWES was next called as a witness for the defendant. He stated that he had lived in Whatcom County fifty-four years, that he was born there. He stated that as a boy and young man he frequently had occasion to go to the river. He stated that he first went to the river in 1868, and has been traveling there ever since, and known about what the conditions were then existed.

He then with great detail located the old Indian village about at the place fixed on the various exhibits.

“He remembered the cottonwood trees and stated that they had grown a great deal since he had first seen them; that they were there when he first knew the territory; that the Indian village was located about abreast of them; that the old Indian church was located at that time at the lower end of the village above the present church; that his means of navigation of the river for himself and family had been a canoe.”

Was asked these specific questions:

“Q. I will ask you if in 1868 and after that date up to 1873 you had occasion to observe where the mouth of the Nooksack was located?

A. Well, I know where we considered it located, where we thought we went into the river when we got to a certain place going up. We always con-

(Testimony of C. T. Tawes.)

sidered when we got to where,—I guess along there (indicating) there was an island where the channel forked when we got to that island we considered we were at the mouth of the river.” [109]

“Q. Where did the volume of water flow at that time? Did it go down the bay this way along the course marked 1889 to 1908, or did it use the course marked 1855 to 1888? A. It went both ways.”

A. It went both ways.”

The witness then stated that the upper end of the island or accretion as he remembered it had grass growing on it. Soon after willows began to grow up. He was asked this question:

“Q. Was it large or relatively small?

A. Oh, it was small. It didn't extend down, I think, over a couple of hundred yards from the upper end of the island. I don't think the grass went more than that. Ordinary high tide went up to the edge of the grass from that on the mudflats.” That there was no growth or vegetation existing between the two channels, one marked 1889 to 1908 and the other marked 1855 to 1888, when he first knew them, they being at the time when he first knew them nothing but sand and mudflats; that all the territory south of steamboat slough which is marked channel 1855 to 1888, was covered with water at ordinary high tide. The little area where the grass was growing has gradually been enlarged; that the McDonough store was first located near the upper end of the Indian village; that his attention was directed to the cedar stump marked on the

(Testimony of C. T. Tawes.)

diagram and thereupon stated that there were no cedar trees located there when he first saw the territory; that no trees were growing near, nor were there any cedar stumps from which trees had been cut at that time; that he was familiar with the habits of the Nooksack River in the matter of carrying down and depositing drift, and that the cedar stump now there in his [110] opinion is merely a piece of drift that came down the river; that he never heard of Treaty rock, but that such rock had been called Patterson rock, because of Patterson having been wrecked upon it; that he is familiar with the channel or watercourse which came down near Marietta; that it had no particular bank on the west side, merely a sandflat, and that it was covered by the line of ordinary high tide, and that the line of ordinary high tide covered the point where steamboat slough designated as 1855-1888 river intersects the present river known as the Zane River, and that the steamboats that came in were built for shallow water and if they had any freight to leave at Marietta they went that way, and if they did not, they often went the other way.

On cross-examination Mr. TAWES:

Q. You say in 1868 the line of the upland, or the line of ordinary high tide was perhaps at what would be the dividing line between Sections 17 and 18 at the point I now refer to?

A. It was somewhere along there.

Q. That is where you pointed, Mr. Tawes, isn't it?

A. I said somewhere along here (indicating). I

(Testimony of C. T. Tawes.)

wouldn't say within a hundred yards where it would come at ordinary high tide. The land is very flat, and a couple of inches would make a good deal of difference.

Q. You would place it at a couple of hundred yards either way?

A. I wouldn't say either way. It wouldn't be any further out, any way.

Q. And that it extended out a semicircular form down to perhaps where below the Indian church?

A. You see there is a kind of barrier in here. It is high along the edge of the river. Then it is that way.

Q. But the main body of land now lying east of the church and south of the Hedge Donation Claim commenced or rather ended at the section line between Sections 17 and 18, and swung around to a point below the church? A. Yes.

Q. Possibly be forty acres or a quarter of a quarter? [111] A. Something like that.

Q. Possibly forty acres? A. Yes.

Q. And you stated that there was perhaps a gradual increase? A. Yes.

Q. Due to the alluvial flow of the river. So that in 1872 it had slightly emerged and was possibly further out towards what is now the intersection of the old river and the Zane River,—is that true?

A. Yes.

Q. And that the area perhaps doubled in those four or five years in the same relative position, swinging now or inscribing a semicircle from the

(Testimony of C. T. Tawes.)

point of intersection of the Zane River and the old channel down to the main land in Section 18, or the upland in 18?

A. Ordinary high tide covered more than that. I was in there last fall, and had to wait for the tide to go in there.

Q. I am referring particularly to the time between 1868 and 1873. A. Yes.

That his occasion for going up the river was his father had a ranch up there and he used to go back and forth. His father's ranch corners on the northeast corner of the reservation. That he was able to tell the extent of land there in 1868 and how it increased from 1868 to 1873 because he had been traveling over it ever since. [112]

“Q. You are able to tell me definitely and accurately the extent of that land in 1868, how it increased from the time you first saw it,—from 1868 to 1873?

A. I think I am. I have been traveling over it ever since.

Q. I am asking you about those five years.

A. I know what the conditions were during those.

Q. How old are you? A. Sixty-four.

Q. Born in 1863? A. 1862.

Q. So at the tender age of five years,—you are now telling me that detailed information acquired at five years of age? A. I went up there first.”

Witness testified that he attended some of the horseraces referred to by the Indians in their testimony. Attended them when he was a growing

(Testimony of C. T. Tawes.)

boy. That the races were run north and south and not east and west along the beach, not across the channel. That a greater volume of water now comes down the river than it did when he first knew it as at that time part of it emptied in the Gulf of Georgia and certain jams up the river had been removed and the water released. Thereupon the following question was asked by plaintiff's counsel:

Q. (Mr. MARTIN.) Do you mean to say you would have the Court believe that you as a boy five years of age could then estimate the water and now make a comparison between the water at the present time or years afterward with the water at that time when you were five years of age?

Mr. ABRAMS.—I submit that the question is unfair. I did not compare it in that way.

The COURT.—I think the question is unfair in your limiting it to five years of age. [113]

Testimony of Victor A. Roder, for Defendants.

VICTOR A. RODER was called as the next witness for the defendant. He testified that he was born in 1861. His father was the owner of the donation claim upon which the town site of Bellingham is situated. He has lived there continuously since his birth.

Q. Did you ever have occasion to go out to the Nooksack River as it runs along the Lummi Indian Reservation? A. Yes, a great many times.

Q. What was your earliest time going out there, Mr. Roder?

(Testimony of Victor A. Roder.)

A. Might vary one or two years; but it was in 1872 or 1873. 1872 or 1873 when I went up in a canoe with A. J. Judson and his wife.

Q. Where did you go in that canoe? From what point to what point?

A. Started at the mouth of Whatcom Creek, entered the mouth of the Nooksack River at the village and changed canoes. Went up to Linden, remained there two or three weeks and returned in the month of July. The reason why I know it was July was because when I was up there we helped set out turnip plants. On our return came down with a shovel-nose canoe, landed at the Nooksack River or Lummi village there, and the Indians secured a salt chuck canoe; and my recollection that we took the main stream and come straight out towards the,—well, I cannot tell you exactly the course, but,—it has been so many years, you know, a man might be mistaken.

Q. (The COURT.) Main stream. What do you mean by that?

A. The main flow of the river that had the greatest volume of water.

Q. Where was that? [114]

A. That flowed straight out from the village and followed down the course afterwards used by the Indian race course.

Q. Will you illustrate on the blackboard Mr. Roder, with the ruler where that is,—where that was?

A. Why, the village—there is the cottonwoods.

(Testimony of Victor A. Roder.)

Where is your shore line,—your west shore line,—on this map?

Mr. MARTIN.—It is not shown.

Mr. ABBOTT.—It is not shown, Mr. Roder, but the church, as it now stands,—I understand that is where the church is now situated,—is that true?

Mr. MARTIN.—Approximately.

Mr. ABBOTT.—These are the cottonwoods. This is the west side of the river, this is the east side. This is where the church now stands. There is where the cottonwoods are situated.

The COURT.—Let him see exhibit 4.

Q. (Mr. ABBOTT.) I invite your attention to plaintiff's identified exhibit 4 and to the various points mentioned thereon. Old Indian houses are shown as approximately opposite the two cottonwood trees. Here is where the church is now situated,—supposed to be where the church is now situated. Now, will you please show to the Court from this what you mean by the main channel of the river,—what course it took?

A. The main course of the river followed down the west bank or the shore line on the west side.

Q. You mean on the eastern side of what is now the reservation? [115]

A. As you come down the river you keep to the right.

Q. Do you know where Fish Point is?

A. That is away down here (indicating).

Q. In regard to the location of Fish Point, how did the river run?

(Testimony of Victor A. Roder.)

A. It followed down a little below where the horseraces was, then bore off a little more to the southeast.

Q. With regard to this Plaintiff's Exhibit 4, Mr. Roder, you will observe that the lines run north and south. A. Yes.

Q. This dart— A. Took a westerly course.

Q. —shown on exhibit 4, I understand indicates the approximate location of Fish Point. Am I correct about that?

Mr. MARTIN.—I think so. It is a point referred to as where the river bent. It is identified more particularly by the photograph.

Mr. ABBOTT.—The photograph is a little difficult to—

Mr. MARTIN.—That is the point where it bent over. I don't know that any name was given to the point. Some point of land.

Q. (Mr. ABBOTT.) Do you recall a point of land jutting out from a point south of the cottonwoods along the shore which is on the west?

A. No, not at that time; no.

Q. That is simply a promontory.

A. My main attention would be directed homeward. I couldn't tell anything about it.

Q. Well, you understand the present situation of the Lummi [116] Indian Reservation as it is situated at the present time, do you not? A. Yes.

Q. And where the Indian village now is?

A. Yes.

Q. And where the church is? A. Yes.

(Testimony of Victor A. Roder.)

Q. Where did this channel run with regard to the church as now located?

A. It followed down that shore.

Q. Shore on which the church is located?

A. Yes.

Q. Approximately how far from the shore?

A. When we used to play ball in there and have horseracing,—it would be pretty hard to say whether it was two hundred feet or four hundred feet.

Q. From the shore?

A. Yes. Run down gradual slope down to the river.

Q. How far down did the river hug that shore, how far south before it made the turn?

A. To be positive, I cannot tell you as to that.

Q. Was it some considerable distance?

A. I wouldn't like to say as to that.

Q. Are you acquainted with the boundaries of the Hedge Donation Claim?

A. Only by referring to maps.

Q. You know where it is situated in a general way?

A. Yes.

Q. Step over to this blackboard now. This indicates the Hedge Donation Claim, Mr. Roder; and with regard to the [117] location of the Hedge Donation Claim, did the body of water at that time,—what year was this approximately that you were talking about,—

A. First was 1872 or 1873.

Q. Did the body of water from that river or channel of that river come around and make an easterly

(Testimony of Victor A. Roder.)

curve over this way to Allen's place and Marietta, or did it come down in a southerly direction along the shore indicated as opposite the figures 18?

A. There isn't any question about that.

Q. Which way did it go?

A. It flowed right down this way (indicating).

Q. Was there any channel of any importance flowing along to the south of the Hedge Donation Claim?

A. I noticed that more of later years, a small slough through there; but at that time I cannot say.

Q. But at that time the main volume of water passed through this course (indicating)?

A. Yes, sir. Later years I observed that slough following along the boundary of the Hedge Donation Claim in an easterly course.

Q. Did you say that you had been over there when they were running horseraces? A. Yes, sir.

Q. Where did they run these horseraces?

A. Below the village there.

Q. On the west side of the river?

A. Yes, on the west side of the river; on the reservation side.

Q. On what is now known as the reservation commonly? [118] A. Yes, sir.

Q. On the west side of the river on the old channel that is making down along the reservation shore at the present time? A. Yes, sir.

Q. That is west of the channel that is marked on this map as 1889 to 1908?

A. That is the one, yes, sir.

(Testimony of Victor A. Roder.)

Q. Now, with regard to the shore as then existing, taking the reservation as it now exists, with this channel running along here marked 1889 to 1908 as one point or one boundary—taking that as one boundary,—and taking the line of the south boundary of the Hedge Donation Claim following around over here to Allen's place,—I want you to state what was the character of the land intervening.

A. You take this entire piece of ground all through here (indicating) was nothing but a tide-flat.

Q. Was it covered with water at ordinary high-tide?

A. Well, at half tide even I have noticed it is nothing but a regular tideflat.

Q. No upland?

A. No upland at all, except right up in here near that slough where that broke through, there was some drift in there and some willows growing, some of this rush grass, gradually increasing. After I had been away ten years I was amazed to see all that accretion and grass growing there. The first time I noticed that was when the state sold those tide-lands, I went up and made an investigation.

[119]

Q. Who to? Mr. Clark? A. Yes.

Q. What year?

A. I cannot tell you what year.

Mr. MARTIN.—1902, according to the record.

The WITNESS.—I was going to say about fifteen

(Testimony of Victor A. Roder.)

years ago. I was actually amazed to see how that was filled in.

Q. (Mr. ABBOTT.) Did you ever hear of a rock out here (pointing) called Treaty Rock?

A. I know that rock, but I never heard it by any particular name. We generally called it the big rock.

Q. How long did your father live here before your birth, Mr. Roder?

A. He came here in 1852. That would be—

Q. That is sufficient as far as that is concerned; you stated the date of your birth. Did you ever hear him mention that as Treaty Rock?

A. No, I have often heard him tell about the river emptying into Lummi Bay.

Q. Lummi Bay?

A. Yes. That would be over into the Gulf of Georgia. When he first came, then it finally broke over and come over into Bellingham Bay. We used to cut hay; had a barn over here near McDonough's store.

Q. When was that?

A. That was before I was born. That is just what he told me, hearsay.

Q. Did you go up there and play with the Indian boys when you were a lad? A. Yes, sir. [120]

Q. How old were you?

A. Seventeen, eighteen, and nineteen.

Q. At that time the river was coming down along this course you have suggested?

A. Yes, sir. I would like to say in connection with

(Testimony of Victor A. Roder.)

that, the river scattered into hundreds of little rivers; as it struck out, scattered here and there.

Q. Little channels that cut in the silt. Did you understand from your father,—did you ever hear that the entire river emptied into Lummi Bay,—is that what I understand you to say? A. Yes.

Q. When he came here? A. Yes.

Q. Do you remember how many years after—

A. No, I just heard him say that in 1852 it emptied into Lummi Bay.

Q. Did you ever hear of any claim being advanced,—ever hear him state that a claim had ever been advanced,—or did you ever hear of any,—that the Indians took title from this rock down to Point Francis?

A. No, we had a lawsuit with the Government over these two claims right in here (pointing),—Barnes Donation Claims,—we owned those,—father owned those,—and the Government took them away.

Q. Canceled them as part of the Indian reservation? A. Yes. Paid us well for them.

Q. Did you have occasion to go to McDonough's store at this point (indicating) many times?

A. First I visited McDonough's store in 1878, 1879 or 1880. [121] I used to ride up there to that store frequently. Our stores were limited here at Bellingham. I expect I visited that store fifty times.

Q. During what period of time?

A. 1878, 1879, and 1880.

Q. On which side of the river was his store?

A. On the Lummi side; reservation side.

(Testimony of Victor A. Roder.)

Q. How would you get across?

A. I would ride my pony. Up here is low water. I would get off here at Allen's then I would strike a trail. There wasn't any sloughs there. I would ride around there and holler, and an Indian would come and take me across.

Q. (The COURT.) Walk across on the tide-lands?

A. No, from Squallum Creek when the tide was out, I would take a pony right up to where the cement plant is now. Then I would have to get on the rocks for a little ways. Come out at Solomon Allen's place.

Q. How did you go across from there?

A. Go across on this Hedge Donation Claim.

Mr. MARTIN.—Trace the course.

Q. (Mr. ABBOTT.) Trace the course that you would take in going across.

Mr. MARTIN.—From Solomon Allen's.

A. Well, come right around near the beach here, something like that (indicating).

Q. (Mr. ABBOTT.) Now, as I understand, you would practically leave the beach at Solomon Allen's place? A. Yes, sir.

Q. About how far would you leave the beach from that rock [122] which they designate as Treaty Rock?

A. I cannot say exactly how far that would be; but it would come up right at Solomon Allen's house.

Q. Mr. Roder, I will ask you whether or not down by that rock to the westward of that rock there was any lands at ordinary high tide extending up above

(Testimony of Victor A. Roder.)

the surface of the water? A. None whatever.

Q. Any defined bank or any kind of a river bank there in those days?

A. No, sir; nothing but a mud flat.

Q. (The COURT.) How was it further up with relation to banks?

A. Well, it gradually increased,—the banks would be.

Q. (Mr. ABBOTT.) You mean the shore line?

A. Shore line.

Mr. MARTIN.—I object.

The COURT.—Let Mr. Roder tell.

A. At high water it broke over there just the other side of Allen's there. That is the salt water would. And when the water was low, this would be a mud flat, looked to be for miles from the shore here. Great place for fishing. In the summer of 1882 I carried the United States mail here and delivered it at McDonough's postoffice, and I had a chance to observe the fishermen out there fishing. A man by the name of "Long Haired" Harris, I remember him so well having so many nets out there. That was all a sandbar when the tide was out for miles and miles; and as the tide come in you could see,—well, there wasn't any grass [123] there at that time. There isn't any question about that.

Q. (Mr. ABBOTT.) When you speak of bank, you refer to upland? A. Upland.

Q. Beach of the upland?

A. Gravel beach. Part of it was used there for a road along in front of Solomon Allen's place.

(Testimony of Victor A. Roder.)

There was no bank of stream there; nothing but mud-flats, so you can travel along with a horse.

Q. Did you ever hear of any Indian races held out there?

Mr. MARTIN.—Object to what he heard.

Q. (Mr. ABBOTT.) Did you ever see—

A. Indian races that were had were on the west side of that stream there below the church. I have known of horse races, though, on mud flats right out here in Bellingham, right out here on the other side of Fort Bellingham. It might possibly be that at very low tide Indians got out there on those tides and run horses; might be, but I never seen it.

Cross-examination.

(By Mr. MARTIN.)

Q. Mr. Roder, how old did you tell me you were?

A. I was born in 1861.

Q. And the first trip you made over there was when? A. In 1872 or 1873.

Q. You would be then aboy about twelve years of age? A. Yes, sir.

Q. Now, some forty odd years after that, you don't attempt to tell us with any accuracy what you observed [124] on that trip?

A. Just some of the main details.

Q. Just some of the main details? A. Yes, sir.

Q. You merely went over in a boat?

A. Canoe.

Q. Then went up the river? A. Yes, sir.

Q. Then, I expect, you returned? A. Yes, sir.

Q. What is your best recollection as to the next

(Testimony of Victor A. Roder.)

trip you made to the reservation?

A. Oh, somewhere in 1876 or 1877; somewhere along there.

Q. That is after you had grown up to be a young boy,—young man,—seventeen or eighteen years of age? A. Yes, sir.

Q. Of course, you, at that tender age, didn't go out day after day and make journeys over there all by yourself? A. No.

Q. But began to go over there when you were seventeen years of age? A. Yes.

Q. And covering what period of time,—say from 1877 or 1878 to when?

A. Every summer; summer months.

Q. During the summer months you went over there? A. Yes, summer and fall months.

Q. From the time you were seventeen up until you were how old? [125] A. Until 1882.

Q. Until 1882? A. Yes.

Q. From 1882 on did you have occasion to go over to the reservation? A. Not as often.

Q. I take it that about that time your business interests had centered over here in Bellingham, so that you only made occasional trips. How many times from 1882 to 1900 were you over there?

A. Up to 1882 I went there quite frequently.

Q. You said every summer from about 1877 or 1878 until 1882? A. Yes, sir.

Q. In other words, for a period of three or four summers from the time you were eighteen until you were about twenty-two. But from the time you were

(Testimony of Victor A. Roder.)

twenty-two at the end of the four or five years—

A. Well, I only visited that at intervals; not so often.

Q. Were you there more than a half dozen times during the next twenty years?

A. Oh, possibly a couple of times a year; but I frequented the shore oftener,—not right onto the reservation after McDonough moved away.

Q. Do you know when McDonough moved from the Indian Village over—

A. I cannot tell you exactly.

Q. From that time on, any time you had occasion to visit the reservation, you came along the shore on the beach or— [126]

A. On the beach when the tide was out.

Q. Or upland when the tide—and crossed that old slough. There has always been a slough there by the store?

A. Not to bother; not enough to bother.

Q. But there was a sort of a slough, sometimes water that your horse could ford or wade across?

A. I always got through without any trouble.

Q. That was not the question.

A. There was just a little brook there.

Q. You would cross that brook, and still on the mainland, cross that mainland on the Hedge Donation Claim, and come over here (indicating) on the main river, and cross on the ferry or canoe at the main river? By canoe.

Q. You never had occasion to go over to this mouth of the river (pointing) after the trip you made when

(Testimony of Victor A. Roder.)

you were a boy twelve years of age?

A. Only when I was sixteen and seventeen and attended those horseraces.

Q. Attended those horseraces? A. Yes, sir.

Q. Now, at that time it is a fact, is it not, that there was this what is designated here as 1855 to 1888 channel, or the old channel,—there was a well-defined channel flowing along easterly parallel to the Hedge Donation Claim, on over to where McDonough fixed his store in 1880, and down out to sea by Treaty Rock?

A. In 1879 I remember when I would leave the trail here and work down, I would come down to a little slough there. There was a little slough there so I couldn't [127] get over. Then you would holler over and the Indians would come over and ferry you across.

Q. Wasn't that simply a bar in the main river here?

A. No, the river was open there (pointing).

Q. The fact is that there has been a slough or a channel running from there across over past McDonough's and out?

A. Yes, when the river was up there would be more or less river flowing down this channel there.

Q. You say some went down there (indicating)?

A. Majority of it went straight down west.

Q. Can you tell us the conditions there when you were a boy sixteen or seventeen years of age? Will you say at this time, forty years removed from that time, at all accurately now as to the body of water

(Testimony of Victor A. Roder.)

which flowed out of this slough (pointing), and the body of water that flowed out of this slough (pointing) ?

A. Yes, for the reason that I was going with a canoe and boat, and I observed that there was little water running down along the Hedge Donation Claim.

Q. Isn't it fact that steamboats went up past McDonough's wharf over across there with equal facility?

A. A little later on. That was a little later on.

Q. You say that from McDonough's wharf looking in a southwesterly direction down toward the southwest corner of section 17 there is a large amount of tide flats exposed? A. At low water.

Q. Now, will you attempt to tell us where the line of tide-flats lay at high water? [128]

A. Well, you couldn't see it at all.

Q. There was still some land exposed to view?

A. No, sir. There might be a little right up here where this canoe channel started in there, right up in there; but you couldn't see any land there.

Q. Aren't you possibly referring to some occasion when you were there when you saw one of these great flood tides,—one of these unusual spring tides?

A. No, sir.

Q. Did you hear the testimony of this other gentleman with a remarkable memory that told us of an area in here?

A. The spring tides would be running over Solomon Allen's place.

(Testimony of Victor A. Roder.)

Q. Let us take this from a standpoint of low water. There was a well-defined bank even though the south and west bank was sand bank or tide flat bank? There was a bank that enclosed the channel, marking each side of the channel, wasn't there, at McDonough's at low tide?

A. There was a gradual slope from the old road down *until struck* this tide flats; gradual slope, but no current washing and forming a bank.

Q. You mean to say that the sand and mud and the flats didn't form a bank so that there was a well-defined channel at low water as far down as McDonough's or nearly out to Treaty Rock at low water?

A. The driftwood would all accumulate and seaweed would pile up along in there,—tons and tons of seaweed.

Q. I didn't ask you about that at all. You said yourself on direct examination that there was miles of land exposed,—miles of exposed tideflats at low water. [129] A. Yes, sir.

Q. Now, isn't it a fact that there was this mouth of the river or branch or arm of the river which ran around the Hedge Donation Claim down past McDonough's out to Treaty Rock, and that that channel was enclosed on one side by the gravel beach and on the other side by a well-defined sand bank?

A. No, sir.

Q. Or well-defined tide-land bank? A. No, sir.

Q. Well, then, do I take it that this land was so that at low water the Nooksack River spread like

(Testimony of Victor A. Roder.)

water would spread over a floor?

A. There was hundreds and hundreds—

Q. Just a moment. Don't explain it by something else. That the water in that would spread over the tideflat without any bank or without any channel, as water would spread over this floor?

A. No, sir. Little streams forms here and there.

Q. Your idea is that this land was like this level floor, and that the water just spread out, but that there was no channel at all?

A. At certain points there was more water than others.

Q. If that is so, there must have been some land separating the water.

A. The land was so sloping that there would not be any bank to it.

Q. You have been in the courtroom to hear the testimony of the Indians in this case? A. Yes, sir.

[130]

Q. You have heard them say that there was a well-defined flow of water past McDonough's?

A. I heard that testimony. I was surprised to hear them telling about going across there. A man might go across there and swim, but he couldn't do it otherwise at high tide.

Q. Following up your statement that the low water land is exposed here (pointing) for miles, would you say that the tideflats at low water would almost enclose all of Section 17 from a line drawn from Treaty Rock over to the southwest corner of Section 17?

(Testimony of Victor A. Roder.)

A. Oh, I cannot say as to that without a measurement or survey.

Q. I mean as you would judge it with your eye, Mr. Roder, to note the enclosed area on the ground?

A. No, I cannot say.

Witness excused.

Testimony of Robert Shields, for Defendants.

ROBERT SHIELDS was next called as witness for the defendants. He stated that he was fifty-five years of age, and that he had lived in Whatcom County since 1882. In the year he engaged in the steamboat freighting business in and around Bellingham Bay and the mouth of the Nooksack River. He hired out as a fireman and deckhand on the old "Quincy," an old steamboat built especially for shallow waters, which was used on the run between Seattle and the town of Whatcom, now Bellingham; that he had occasion to carry a great deal of freight to McDonough's wharf. He stated that if the tide was right, they would go up Steamboat Slough, deliver freight at the wharf, and continue on up the Nooksack River to Ferndale. [131] If the tide was not right, they would go up *that* they termed the main channel of the river.

His attention was called to the 1889-1908 river, and was asked whether he referred to the main channel of the river as the 1889-1908 river, or the 1855-1888 river. He replied that the main channel of the river *was* designated on the map was the 1889-1908 river, stating that his boat went directly

(Testimony of Robert Shields.)

across from there to Marietta, and followed that channel up to Ferndale. He worked on the "Quincy" about four months, and made a trip on the average of once a week over the harbor in question. He was asked whether he had ever heard of the big rock at the mouth called "Treaty Rock" and he replied that he did not hear it so called until some time afterwards.

When the witness first came to Whatcom, McDonough had an old store over on the reservation side, but afterwards moved to the Marietta side at the place referred to as McDonough's wharf on Plaintiff's Exhibit 4. He testified that the land lying between Steamboat Slough and the main river was all mudflats.

The main channel of the river flowed in a westerly direction straight out. There were no jams and drift, it was an open river. The territory lying to the south of Steamboat Slough (marked 1855 to 1888) was also covered with water at one-half tide or better. When the tide was up it was away above steamboat slough.

In 1886 he had occasion to walk across by steamboat slough and it was all mudflats above steamboat slough and below, that is, north and south of the slough. The mudflats north of the slough extending up to a ridge that they traveled upon. His attention was directed to the point where the water divided, part going through [132] steamboat slough and part in what he had stated was the main channel of the river, as to a growth of grass and

(Testimony of Robert Shields.)

willows, and was asked if he noticed them on his first visit in 1882. He answered that when the tide was about one-half out, you could see a little bunch there on a little island covering an acre or such a matter.

That he visited the territory the night preceding his testimony and observed the cedar stump concerning which testimony has been given. That he is a millman, engaged in operating a mill of his own, and that in 1882 there was no cedar or other timber growing in there. That in his opinion the stump came down by driftwood.

On cross-examination, this witness stated that Steamboat Slough took its name from the fact that steamboats carried freight from McDonough's wharf, but that they had difficulty in going up the slough to the main river when the tide was low, stating that they never attempted it except when the tide was high, or not lower than half tide. He stated that when the tide was out, there was very little water flowing out of Steamboat Slough, and explained this condition by saying that in the early days when there [133] was no clearing, the river was dammed in lots of places, and all the creeks jammed, and that the river wasn't half as large as at the present time. Since that time they have cleared it up and the volume of water gets away more quickly. He denied that the slough had any banks whatsoever.

(Testimony of Robert Shields.)

On cross-examination the witness stated that when he went up in 1882 they landed at Marietta, but that they could not always get up steamboat slough over to the Indian village. It would take pretty nearly a full tide. That the slough is not called steamboat slough on account of the fact that boats with large draft compared with Indian canoes went up and down there, because if there was a full tide they could go any place across with a flat-bottomed boat.

That there never was two mouths of the river. That there never was any river in steamboat slough. That you could only get up there when the tide was in. That it was all mudflats and sand bars at low tide from McDonough's wharf at Marietta over to Fish Point. That steamboat slough did not have any well-defined banks. That he had never seen the banks of it at all to his knowledge. That the tide went out and he got stuck in steamboat slough. The slough was practically dry land when the tide was out. That in the early days of the country when there was no clearing practically, and the river was jammed in lots of places and the creeks jammed, the river was about a third as large as at the present time. That since they got it cleared up the volume of water gets away quickly. When the tide was out the only water came down the channel 1889 to 1908. Steamboat slough was a salt-water slough. [134]

Testimony of Mrs. Nell S. Coupe, for Defendants.

The next witness for the defendants was Mrs. NELL S. COUPE, who testified that she was seventy-two years of age, and had lived in Bellingham continually since 1871. Her husband, Mr. Coupe, squatted on the claim up on Nooksack River in that year, which was now a part of the town site of Lynden. The mode of travel at this time was by Indian canoes, and she remembered entering the river at some point below the white church on the reservation side. She first went up the river in 1870. She was at that time governess to the children of a Col. Haller, who was one of the pioneers in that locality. She made her first trip up the river with one Bundy Judson, leaving Mr. Eldredge's Donation Claim in Bellingham Bay, crossing to the mouth of the Nooksack, and went up the river. She stated that after leaving Fort Bellingham they struck diagonally across the bay until they came to some distance below the white church.

On the shore of the peninsula that is commonly called the Lummi Indian Reservation at the present time quite a long distance below the white church.

When about halfway across the bay, she asked Bundy: "Where's Allen's?" because one of the Allen boys had to walk daily to the school where she was teaching in Bellingham. She was curious to know how far he lived from the school, so made this inquiry. Bundy pointed some distance to the shore, which was some distance away on the main-

(Testimony of Mrs. Nell S. Coupe.)

land from the white [135] church on the reservation. Bundy had left his shovel-nose canoe at the mouth of the river, and had made the trip across the bay in a boat. They landed on the reservation side at the place where Bundy had left his canoe, and made the change at that point. He told her that that was the Indian Reservation. She remembered that she inquired of him whether he had not said he left his canoe at the mouth of the river. He replied as she recalled, "This is the mouth of the river." She answered by saying, "It looks more like a bay," because I saw no mouth of the river because the tide was high. This point was some distance below the church in a direct southerly line approximately. We landed on the land that continued out to Point Francis. A week later she came down the river by the channel which she entered. It was low tide at this time. She could distinctly see the river channel. There appeared to be an island of mud raised on the side of the river channel.

3. *In lieu of lines 17 to 22 inclusive page 62, insert:*

The width of the river channel at that point was enough for several canoes abreast up. It was a distinct channel and the water was running rather swift. The river still passed close to the shore where the church sat but as we came below the church following the same channel, there was a little mudflat between the shore and the river, but very little. The tide had gone down and we were in very close to dry land. It was only a few feet. That the channel traversed the shore of the Indian Reser-

(Testimony of Mrs. Nell S. Coupe.)

vation as it is now commonly understood, very close. That she went up there again in 1872 and the situation was precisely the same, and that she came down in 1873 and the situation was identically the same. That she went back again and came down in 1874 and there was no difference that could be observed.

That she resided in Lynden until 1880 or 1881 and came down the river twice a year in 1874, 1875 and 1876; that she never during any of those periods, observed any river channel making off to the eastward; that she never heard of steamboat slough until she came to the courtroom. [136]

Testimony of Charles L. Judson, for Defendants.

Defendants' next witness was CHARLES L. JUDSON, who stated that he had resided in Whatcom County since 1870 continually. He was born in 1853, and was seventeen or eighteen years of age when he arrived in Whatcom. He engaged in farming in Lynden after arriving here in 1870. His only outlet was down the river. He had to freight everything to his place. He stated that he was supplying the Bellingham Bay Coal Company with produce and butter, and had to make regular trips. He also carried passengers, and carried the mail four years. He knew Mrs. Coupe, and said that he was the man whom Mrs. Coupe referred to as "Bundy Judson."

He remembered the two cottonwoods and stated that the church was almost opposite the cottonwoods. That in the early days the land that lay below steamboat slough had nothing growing on it

(Testimony of Charles L. Judson.)

and that in the period from 1879 to 1883 some willows and tea grass commenced to grow on it.

Asked as to what course he followed in freighting and carrying passengers in 1870, he replied that in the summer time especially, they would keep well over so as to get a good west wind and sail to Bellingham, leaving the river by the channel marked 1889-1908. Asked as to where the mouth of the river was, he replied that it was at the Catholic church, which is near the point of the cottonwood trees and cedar stump. He said that Steamboat Slough was used in carrying the mail especially in high water. He was asked the question:

“Q. Was there any particular channel, Mr. Judson, until you arrived at this point when you went in on the tide? [137]”

A. Well, we would go in first one channel and then another, that is, in the first part of the seventies after the river began to throw driftwood in here, this began to grow higher and seemed to throw the water over on this bank.”

During the latter part of his freighting, he came down pretty close to Allen's house. He never heard of Treaty Rock by that name, but heard it referred to as “Patterson's Rock,” because one Col. Patterson had wrecked his canoe on it.

On cross-examination, he was asked as to the depth of water in these two sloughs, and how they compared, and replied as follows: [138]

“A. Very shallow, sometimes one would have greater water than the other. Very changeable.

(Testimony of Charles L. Judson.)

Depended upon the stages of the water in the river, whether high or low.

Q. At times there would be more water in this slough, the one that runs along in front of Hedges Donation Claim; sometimes more water in this other one?

A. After 1880 most of the water went down there.

Q. Indicating Steamboat Slough. When you first went there in 1870, there was at low tide a large area of land exposed?

A. Away over here somewheres. I upset a canoe with a load of passengers out here (pointing) seemed to me to be a mile from Allen's.

Q. A mile from Allen's? A. It seemed so.

Q. Probably nearly a mile from the Indian village? A. Yes.

Q. Shallow water way down here below Allen's at low tide.

Q. How far down on that diagram would you say that the land was exposed at low tide?

A. At extreme low tide when the river was low, it would be way down nearly opposite Allen's, I think.

Q. The channel was enclosed in the mud banks on each side of it? A. In the mud." [139]

Q. (The COURT.) How wide, Mr. Judson, was this channel over south of the Catholic church as compared to the width of the channel designated as Steamboat Slough in 1870?

A. You mean where the old Catholic church was?

Q. Yes.

(Testimony of Charles L. Judson.)

A. Well, that was the full river there, and down below it wasn't. It was all divided up.

Q. How wide was it below?

A. It was narrower.

Q. How wide was Steamboat Slough?

A. That is where I suppose you have reference,—the channel towards McDonough's store.

Q. How is that?

A. That was narrow. They were all narrow.

Q. How much of the water of the river went out at the Lummi River when you came there?

A. Well, I cannot tell you now how much. Usually when I made it my business to get through on high tide, I always calculated to do it, because it was very difficult to get out there with a loaded canoe; took great chances in getting into trouble.

Q. What proportion of the water do you think came down into Bellingham Bay and what portion went over into Lummi Bay, coming down the Nooksack River?

A. I think the greatest proportion of the water come in through on the island side, that is, below this island, I have reference to here, then it diverged even above McDonough's store and went off this way around the—

Witness excused. [140]

Testimony of J. L. Likins, for Defendants.

J. L. LIKINS was next called as witness for the defendants.

He testified that he was then Deputy Fish Commissioner for the State of Washington; that he had

(Testimony of J. L. Likins.)

resided in Whatcom County since July, 1883, maintaining a continuous residence there. In that year he went to work on a steamboat called "Gazelle," which plied between sound points and the Nooksack River carrying freight and some passengers. He knew the condition of the river in 1883, and stated that according to his recollection, they went across from Bellingham in the northwesterly direction, striking in along the flats about a mile south of the present town of Marietta. He was shown Plaintiff's Exhibit 4, and his attention called to the location of the Indian village, and stated that he went up the channel past the Indian village, passed by the old church. He does not remember the cottonwood trees. Asked as to the course leaving the river, he answered that it was a general southerly one. The steamboat on which he was employed was a shallow draft vessel one hundred feet long, drawing about seven feet.

Testimony of John S. Jones, for Defendants.

JOHN S. JONES was next called by the defendants.

He stated that he had lived at Marietta some thirty years engaged in farming most of the time. He first went up the river in 1876. He remembered the cottonwood trees referred to during the trial and the location of McDonough's store. He used to trade in the Indian village. He was asked with reference to the line of the Hedges Donation Claim, the boundary of the tract marked "Reservation,"

(Testimony of John S. Jones.)

“Cottonwood trees,” and “Allen’s Place,” what kind of land was located [141] between these boundary lines mentioned. He replied that it was practically all sandflats. Asked as to there being any defined channels in that flat, he answered: “Well, there was several channels.”

Q. Where did the river mouth? Where was the mouth of the river?

A. Well, now, that is a question that no one ever told; but we always used to think that when we got into the river that would be all right over those flats.

Q. Got into what point, Mr. Jones?

A. Well, somewhere *with* a few hundred yards or probably less than that of McDonough’s store.

Q. Where it was originally located?

A. Yes. No, no, no; up on the reservation.

Q. What point with regard to the cottonwood trees? I will put it that way.

A. Not very far from the cottonwood trees.

Q. On which side?

A. That we considered. Of course, I don’t know whether that was the mouth of the river or not.

Q. I understand, Mr. Jones.

A. Because it spreads, you know.

Q. But you mean, as I understand, a point approximating the cottonwood trees, do you?

A. Yes. Somewhere in that neighborhood; a little up above probably. At the point of the cottonwood trees, the river spread out at high tide across these great flats. He was asked what was

(Testimony of John S. Jones.)

the course of the Nooksack River in 1876 after it struck the tide-lands. He replied that he could not tell which was the largest channel. [142]

I cannot tell which was the largest channel. Probably the one that went toward Eliza Island. Probably was the best channel but we never used that channel.

Witness was asked this question by defendants' counsel:

“Q. Now, I would direct your attention to this portion here first. Here is the channel marked 1889–1908 and there is the church. Here is the channel marked 1855–1888, which extends over here across the mouth of the Zane River and across the slough beyond Marietta, down to what they call ‘Treaty Rock.’

A. That is the one we always used to follow when we were coming down to McDonough's. You see that is where we used to do our trading. When we would go from the ranch to Bellingham, we would go over this other way.

Q. In 1876, calling your attention to the channel you say you took when you went the other way,—was there a well-defined channel of the Nooksack River along the line indicated 1889–1908?

A. You cannot call it a very well-defined channel when the tide was out. You couldn't call either of them that. You couldn't go up there at all with a keel boat. There were a number of channels. [143]

Q. As I understand you, beginning at the cotton-

(Testimony of John S. Jones.)

wood trees, the river spread out into a number of little cuts on the tideflats?

A. Yes, lots of them, the same to-day.

Q. However, there was a channel, as I understand from you, on this side that you came out on (pointing)?

A. Yes. When we were coming to Bellingham—that is, it would depend on the wind a good deal,—we would take that other channel, you know, that goes straight out, rather than come around by McDonough's, because we would make headway, but always when coming home, we would come the other way, because we had something to take home from the store.

Q. You are speaking of canoe travel?

A. Yes, by canoe."

On cross-examination, Mr. Jones was asked whether the channel running in front of Hedges Donation Claim from the cottonwood trees was not the best channel. He answered, "No, I cannot say that."

"Q. It was the channel more frequently traveled than the other way?

A. Possibly, that was the way we traded.

Q. Yes, by people generally there was more travel along that channel than there was on this one.

A. Well, it depends altogether whether you were trading in the store or whether you went to Bellingham on that.

Q. And in low water this channel here was enclosed

(Testimony of John S. Jones.)

on one side by the mainland and the other side by the sand banks and flats. [144]

A. Well, part way.

Q. It was enclosed as far down as McDonough's store? A. No, oh, no.

Q. At low tide? A. Oh, no.

Q. As a matter of fact, all this land opposite McDonough's away over to the other bank was all exposed? [145]

A. Yes, all of it with the exception of a little below the island,—a little narrow strip until you came to the island.

Q. That land was all out of the water at low tide?

A. It was all out of the water with the exception of little trickling streams.

Q. Which one of those sloughs or channels contained the most water?

A. That is a question I cannot answer. I have seen in front of McDonough's store that there wasn't actually a drop of water running down there.

Q. That was times when very little water in the river; times when the river was very low?

A. I have known Mr. McDonough to hire teams to scrape and make a channel for the water.

Q. What do you think McDonough placed his wharf there if it was not a deep water channel?

A. He had to leave the reservation. He wanted to be as convenient to the reservation as he could.

Q. And convenient to water traffic, because all the transportation in those days was across water?

A. Yes, sir; always.

(Testimony of John S. Jones.)

Q. That is the reason that he placed his wharf there because it was in front of a deep-water channel?

A. Well, it was the only place that he could have at the time near the reservation.

Q. For the purpose of having boats bring his goods, wares and merchandise up there and for him to deal with the people over there at the reservation.

A. (No response.)

Witness excused. [146]

There was thereupon offered and admitted under reserved ruling, over the objection of plaintiff, defendants' admitted exhibits "I," "J" and "K," being letters of instructions, etc., and on the application of plaintiff's counsel the field-notes identified as Plaintiff's Exhibits 10 and 11, respectively, were likewise admitted and filed.

**Testimony of Joseph M. Snow, for the Government
(Recalled).**

JOSEPH M. SNOW, surveyor, who made the Snow survey in 1873 and 1874, was recalled and testified that the map concerning which he had referred in his former testimony as having been furnished him, of the reservation, by the surveyor-general's office, indicated the exterior boundaries of the reservation and came along with his other instructions; that he was on the reservation some six weeks surveying the boundaries and was taken to and from the village probably about two times a week during that time and camped there about a week, and saw and

(Testimony of Joseph M. Snow.)

talked with the Indians on the reservation meeting them at the village and scattered around where they lived on the reservation at various points, and saw them when he was running the lines at the mouth of the river, and below that point, and told them what his purpose was; that the Indians followed him around and asked questions as to what he was doing and why he was doing it, and he made it a point to explain to them as to what he was doing there and why.

That none of the Indians attempted to indicate to him where the boundaries were at that time and made no attempt to indicate that any portion of the land which lay to the eastward of the line marked 1889 to 1908 belonged to the reservation or should be included in its exterior boundaries, and that none of them ever called his attention to Treaty Rock, nor did he ever hear of Treaty Rock until he heard of it on this trial, and that they did not call his attention to any rock as being a monument at all.

On cross-examination he was asked whether he was concerned entirely with platting the upland on the west side of the reservation into forty acre tracts, and replied that these were his instructions. He was asked whether he inquired of the Indians as to whether they wanted the disputed land in this case surveyed, and admitted that he had not asked them about it. He admitted further that he confined [147] himself solely to his instructions with reference to the establishment of these tracts, and said:

(Testimony of Joseph M. Snow.)

“Q. You had no occasion to ascertain whether the Indians claimed title to the tide-lands, or not?”

A. The Indians, as I say, are always telling the surveyor all they know and what they want. That has been my experience at least.”

At the time the defense offered certain exhibits, to wit: “I,” “J,” and “K,” being letters of instructions from the Commissioner of the General Land Office to the United States Surveyor General at Olympia, pertaining to the resurvey for allotment purposes.

Counsel for the Government objected on the ground that the survey with notes and instructions appeared to relate entirely to the upland with no attempt or purpose to show the mouth of the Nooksack River, or the extent of the tide-lands at low water. The Court admitted these documents, to which plaintiff excepted.

Defendants then offered Plaintiff’s Exhibit “L,” being a tracing of the donation claim plat showing all the donation claims on Bellingham Bay. Plaintiff objected on the ground that they did not attempt to establish the mouth of the Nooksack River, and preserved an exception to the Court’s ruling admitting the same.

**Testimony of Capt. Campbell, for the Government
(In Rebuttal).**

Capt. CAMPBELL was called in rebuttal by the plaintiff, and asked whether he had attempted to [148] to plat the tide-land grants of the defend-

(Testimony of Capt. Campbell.)

ants. He replied that he had covered such portions of these lands as were not submerged. He described the first grant in the complaint as the one in front of the Hedges Donation Claim, meander corner between 17 and 18, extending southwesterly and northwesterly to the meander corner between Sections 17 and 18 on the east bank of the original river. This grant of land had no boundaries whatsoever, but simply designated as being tide-lands in front of and adjacent to the Hedges Donation Claim. He then described the grants to Romaine and his associates contained in two purchases which he attempted to plat on the map.

**Testimony of Albert Descanum, for the Government
(In Rebuttal).**

ALBERT DESCANUM was called also in rebuttal and stated that he had been pilot on the river steamer plying on the Nooksack. The boats he worked on went up Steamboat Slough when he was first employed forty years ago. [149]

The COURT.—I will consider the testimony and the entire case, and determine the matter upon either the law, if it should be determined on your motion, Mr. Abbott, or upon the facts and issues as may be found to be established. And upon the facts I don't care for argument, unless you gentlemen desire to be heard. I may state that I know personally nearly all these witnesses, Indians as well as white men. I heard all the evidence, and it is a matter of analyzing the testimony with relation to the few points as pre-

sented, and then applying the law as may be applicable to the facts. [150]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE et al.,

Defendants.

Order Approving Statement of Evidence.

I, Jeremiah Neterer, Judge of the above-entitled court, and the Judge before whom the above case was tried, do hereby certify, the plaintiff and the defendants having been represented by their respective counsel in open court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the plaintiff from the judgment entered herein against the plaintiff and in favor of the defendants; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal, and order further that all the original exhibits be transmitted to the Appellate Court.

Done in open court this 13th day of March, A. D. 1918.

JEREMIAH NETERER,
United States District Judge. [151]

[Endorsed]: Statement of Testimony. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 14, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [152]

United States District Court, Western District of Washington, Northern Division.

IN EQUITY—No. 8.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE, His Wife, FRED J. WOOD and ANNA WOOD, His Wife, ROBERT SHIELDS and AUGUSTA J. SHIELDS, His Wife, Estate of A. J. ZANE, Together With the Executor Thereof and the Heirs at Law Thereto When the Same Shall be Determined, Estate of M. J. CLARK, ELLEN CLARK, His Widow, PHILIP CLARK and Mrs. SAMUEL MAYHEW, Together With the Executor of the Estate of Said M. J. CLARK and the Heirs at Law Thereto When the Same Shall be Determined, C. M. ADAMS and BELLE M. ADAMS, His Wife, JOHN WILLIAMS, MATILDA FRANCES, EDWARD WARBASS, PHILIP BOB, HARRY PRICE, HENRY SENIOR and DANIEL CUSH, and All Persons Claiming an Interest in the Property Herein Described,

Defendants.

Citation on Appeal (Copy).

United States of America to J. W. Romaine and Martha B. Romaine, His Wife; Fred J. Wood and Anna Wood, His Wife; Robert Shields and Augusta J. Shields, His Wife; Georgia Zane Bull, A. J. Zane and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, GREETING:

You are hereby notified that in a certain case in equity in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff, Fred J. Wood and Anna Wood, his wife, Robert Shields and Augusta J. Shields, his wife, Estate of [153] M. J. Clark, Ellen Clark, his widow, Philip Clark and Mrs. Samuel Mayhew, together with the executors of the estate of said M. J. Clark and the heirs at law thereto when the same shall be determined, C. M. Adams and Belle M. Adams, his wife, John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush, and all persons claiming an interest in the property herein described, are defendants, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, on or before the 15th day of March, A. D. 1918, or within thirty days after the date of this citation, to show cause, if

any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this, the 13th day of February, A. D. 1918.

JEREMIAH NETERER,
United States District Judge.

Service of the foregoing Citation admitted this 14th day of February, A. D. 1918.

ROMAINE & ABRAMS,
HADLEY & ABBOTT,

Attorneys for J. W. Romaine and [154] Martha B. Romaine, His Wife; Fred J. Wood and Anna Wood, His Wife; Robert Shields and Augusta J. Shields, His Wife; Georgia Zane Bull, A. J. Zane and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, Defendants.

[Endorsed]: Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 21, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [155]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and ANNA
WOOD, His Wife, ROBERT SHIELDS and
AUGUSTA J. SHIELDS, His Wife, Estate
of A. J. ZANE, Together With the Executor
Thereof and the Heirs at Law Thereto When
the Same Shall be Determined, Estate of M.
J. CLARK, ELLEN CLARK, His Widow,
PHILIP CLARK and Mrs. SAMUEL MAY-
HEW, Together With the Executor of the
Estate of Said M. J. CLARK and the Heirs
at Law Thereto When the Same Shall be
Determind, C. M. ADAMS and BELLE M.
ADAMS, His Wife, JOHN WILLIAMS,
MATILDA FRANCES, EDWARD WAR-
BASS, PHILIP BOB, HARRY PRICE,
HENRY SENIOR, and DANIEL CUSH,
and All Persons Claiming an Interest in the
Property Herein Described,

Defendants.

Praeceptum for Transcript of Record.

To Frank L. Crosby, Clerk of said Court:

Kindly prepare, certify and transmit to the Clerk
of the Circuit Court of Appeals for the Ninth Cir-

cuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit: [156]

1. Bill of complaint.
2. Answer to bill of complaint.
3. Memorandum decision of the court.
4. Decree.
5. Petition for appeal.
6. Assignment of errors.
7. Order allowing appeal.
8. Citation.
9. Statement of evidence.
10. Praeceptum of plaintiff for record on appeal.

Dated at Seattle, Washington, February 13, 1918.

CLAY ALLEN,

United States Attorney,

DONALD A. McDONALD,

Assistant United States Attorney,

Solicitors for Plaintiff.

Service of the within praecipe is hereby admitted this 14th day of February, 1918.

ROMAINE & ABRAMS,

HADLEY & ABBOTT,

Attorney for J. W. Romaine and Wife, Fred J.

Wood and Wife, Robert Shields and Wife,

Georgia Zane Bull, A. J. Zane and Clara Zane,

Ellen Clark, Philip Clark and Katherine May-

hew, Defendants. [157]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Ap-

peals for printing as provided under Rule 105 of this Court.

BEN L. MOORE,
United States Attorney,
DONALD A. McDONALD,
Assistant United States Attorney.

[Endorsed]: Praecipe of Plaintiff for Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 21, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [158]

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and ANNA
WOOD, His Wife, ROBERT SHIELDS and
AUGUSTA J. SHIELDS, His Wife, Estate
of A. J. ZANE, Together With the Executor
Thereof and the Heirs at Law Thereto When
the Same Shall be Determined, Estate of M.
J. CLARK, ELLEN CLARK, His Widow,
PHILIP CLARK, and Mrs. SAMUEL
MAYHEW, Together With the Executor of
the Estate of Said M. J. CLARK and the
Heirs at Law Thereto When the Same Shall

be Determined, C. M. ADAMS and BELLE M. ADAMS, His Wife, JOHN WILLIAMS, MATILDA FRANCES, EDWARD WARBASS, PHILIP BOB, HARRY PRICE, HENRY SENIOR, and DANIEL CUSH, and All Persons Claiming an Interest in the Property Herein Described,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten record numbered from 1 to 164, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record [159] herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, chargeable to the United States,

and that the said sum will be included in my account against the United States for Clerk's fees for the quarter ending June 30, 1918, for making typewritten transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S., as amended by Sec. 6, Act of March 2, 1905) for making typewritten transcript of record—410 folios at 15¢	\$61.50
Certificate of Clerk to transcript of record 4 folios at 15¢60
Seal to said Certificate20
Certificate of Clerk to Original Exhibits— 3 folios at 15¢45
Seal to said Certificate20
<hr/>	
Total	\$62.95

I hereby certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 18th day of April, 1918.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [160]

*United States District Court, Western District of
Washington, Northern Division.*

IN EQUITY—No. 8.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE and MARTHA B. ROMAINE,
His Wife, FRED J. WOOD and ANNA
WOOD, His Wife, ROBERT SHIELDS and
AUGUSTA J. SHIELDS, His Wife, Estate
of A. J. ZANE Together With the Executor
Thereof and the Heirs at Law Thereto When
the Same Shall be Determined, Estate of M. J.
CLARK, ELLEN CLARK, His Widow,
PHILIP CLARK and Mrs. SAMUEL
MAYHEW, Together With the Executor of
the Estate of Said M. J. CLARK and the
Heirs at Law Thereto When the Same Shall
be Determined, C. M. ADAMS and BELLE
M. ADAMS, His Wife, JOHN WILLIAMS,
MATILDA FRANCES, EDWARD WAR-
BASS, PHILIP BOB, HARRY PRICE,
HENRY SENIOR and DANIEL CUSH,
and All Persons Claiming an Interest in the
Property Herein Described,

Defendants.

Citation on Appeal (Original).

United States of America to J. W. Romaine and
Martha B. Romaine, His Wife; Fred J. Wood
and Anna Wood, His Wife; Robert Shields and

Augusta J. Shields, His Wife; Georgia Zane Bull, A. J. Zane and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew,
GREETING:

You are hereby notified that in a certain case in equity in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff and J. W. Romaine and Martha B. Romaine, his wife, Fred J. Wood and Anna Wood, his wife, Robert Shields and Augusta J. Shields, his wife, Estate of [161] M. J. Clark, Ellen Clerk, his widow, Philip Clark and Mrs. Samuel Mayhew, together with the Executor of the Estate of said M. J. Clark and the heirs at law thereto when the same shall be determined, C. M. Adams and Belle M. Adams, his wife, John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush, and all persons claiming an interest in the property herein described, are defendants, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, on or before the 15th day of March, A. D. 1918, or within thirty days after the date of this citation, to show cause, if any there be why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this, the 13th day of February, A. D. 1918.

JEREMIAH NETERER,
United States District Judge.

Service of the foregoing Citation admitted this 14th day of February, A. D. 1918.

ROMAINE & ABRAMS,
HADLEY & ABBOTT,

Attorneys for J. W. Romaine and [162] Martha B. Romaine, His Wife; Fred J. Wood and Anna Wood, His Wife; Robert Shields and Augusta J. Shields, His Wife; Georgia Zane Bull, A. J. Zane, and Clara B. Zane; Ellen Clark, Philip Clark and Katherine Mayhew, Defendants. [163]

[Endorsed]: No. 8—In Equity. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. J. W. Romaine et al., Defendants. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 21, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy.

[Endorsed]: No. 3153. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. J. W. Romaine and Martha B. Romaine, His Wife, Fred J. Wood and Anna Wood, His Wife, Robert Shields and Augusta J. Shields, His Wife, Estate of M. J. Clark, Ellen Clark, His Widow, Philip Clark and Mrs. Samuel Mayhew, Together With the Executor of the Estate of said M. J. Clark and the Heirs at Law Thereto When the Same Shall be Determined, C. M. Adams and Belle Adams, His Wife, John Williams, Matilda Frances, Edward Warbass, Philip Bob, Harry Price, Henry Senior and Daniel Cush, and All Persons Claiming an Interest in the Property Herein Described, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 16, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States District Court, Western District of
Washington, Northern Division.*

No. 8—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. ROMAINE et al.,

Defendants,

**Order Extending Time to and Including April 30,
1918, to Prepare Certified Transcript of Record
on Appeal.**

Now, on this 23d day of February, A. D. 1918, upon motion of attorneys for plaintiff and for sufficient cause appearing, it is ordered that the time within which the clerk of this court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this case be, and the same is hereby extended to, and including, the 30th day of April, A. D. 1918.

Done in open court this 23d day of February, A. D. 1918.

JEREMIAH NETERER,

United States District Judge.

We hereby consent to the entry of the above order.

ROMAINE & ADAMS,

HADLEY & ABBOTT,

Attorneys for Defendants.

[Endorsed]: No. 8—In Equity. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. J. W. Romaine et al., Defendants. Order Extending Time to Prepare, Certify and Transmit Transcript of Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 23, 1918. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy.

No. 3153. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 30, 1918, to File Record Thereof and to Docket Case. Filed May 16, 1918. F. D. Monckton, Clerk.

